(1) Supreme Court, U.S.
FILED
00-509 OCT 2 2000
OFFICE OF THE CLERK

NO. ____

IN THE
Supreme Court of the United States

MARILYN ARONS, RUTH WATSON, AND PARENT INFORMATION CENTER OF NEW JERSEY, INC.,
Petitioners,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF DELAWARE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Delaware

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners Marilyn Arons and Ruth Watson are non-lawyers who assist parents at administrative hearings held under the Individuals with Disabilities Education Act ("IDEA"). IDEA accords parents "the right to be accompanied and advised" by counsel or "by individuals with special knowledge or training with respect to children with disabilities." 20 U.S.C. 1415(h)(1). The Supreme Court of Delaware found that petitioners had engaged in the unauthorized practice of law ("UPL") by providing such assistance. The questions presented are:

1. Does IDEA's guarantee that parents may be accompanied and advised by "individuals with special knowledge or training with respect to children with disabilities" entitle parents to have non-lawyer advocates appear on their behalf at IDEA hearings, as the Department of Education, the agency charged with administering IDEA, has consistently held for twenty years?

2. Does IDEA impliedly preempt Delaware's UPL rules where, as here, the Department of Education has concluded that application of those rules to bar lay representation in IDEA hearings would "unquestionably subvert" the Act's core goal of empowering parents to challenge adverse school board decisions?

PARTIES TO THIS PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The petitioners in this case are Marilyn Arons, Ruth Watson, and the Parent Information Center of New Jersey, Inc., a non-profit organization with which Ms. Arons and Ms. Watson are affiliated. The respondent is the Office of Disciplinary Counsel of the Supreme Court of the State of Delaware. The United States filed a brief *amicus curiae* in the Delaware Supreme Court supporting respondents and setting forth the views of the United States Department of Education, the agency charged with administering the Act. The one corporation involved in the case, the Parents Information Center of New Jersey, Inc., is a non-profit corporation with no shareholders, no stock, and no parent or subsidiary corporations.

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PETITION FOR A WRIT OF CERTIORARI

Marilyn Arons, Ruth Watson and the Parents Information Center of New Jersey, Inc. ("Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Delaware in this case.

OPINION BELOW

The opinion of the Supreme Court of Delaware is reported at 756 A.2d 867 (Del. 2000) and is set forth in the Appendix ("App.") at 1A-15A. The Findings and Recommended Disposition of the Board on the Unauthorized Practice of Law of the Delaware Supreme Court is unreported and is set forth at App. 16A-42A.

JURISDICTION

The judgment of the Supreme Court of Delaware was entered on July 6, 2000. This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV.

The pertinent provision of the Individuals with Disabilities Education Act, 20 U.S.C. 1415 ("IDEA"), provides:

Procedural safeguards ***

(h) Safeguards. Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded--

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions * * *.

STATEMENT OF THE CASE

The unauthorized practice of law ("UPL") proceedings giving rise to this Petition were an outgrowth of five IDEA hearings conducted by the Delaware Department of Public Instruction in which Ms. Arons and Ms. Watson appeared on behalf of parents. Ms. Arons and Ms. Watson are, respectively, the founder and the Executive Director of the Parents Information Center of New Jersey, Inc., a non-profit organization established in 1977 to provide advice, counseling and advocacy services to families of children with disabilities. Because the hearings that Ms. Arons and Ms. Watson handled were held pursuant to IDEA, and because Petitioners' argument is based in large measure on the preemptive reach of IDEA, we start with an overview of IDEA's structure and purpose. We then recount the proceedings before the Board on Unauthorized Practice of Law and the Delaware Supreme Court.

A. IDEA.

IDEA was enacted in response to Congress' longstanding concern that "more than half of the children with disabilities in the United States do not receive appropriate services." 20 U.S.C. 1400(b)(3); *see also Honig v. Doe*, 484 U.S. 305, 309-12 (1984); *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982). Congress' goal in IDEA was to "assure that all children with disabilities have available to them . . . a free appropriate public education" and to protect the rights of children with disabilities and their parents or guardians. 20 U.S.C. 1400(c). Accordingly, Congress devised a system of funding for special education and evaluative procedures, 20 U.S.C. 1411, and required States and localities that accept such funding to implement a plan for providing special education, identifying children who need special educational assistance, and determining what assistance each child needs. 20 U.S.C. 1412-1414. Delaware participates in and receives federal funds under IDEA. App. A44 (¶5).

At IDEA's heart are the procedural safeguards that States and localities are required to accord "children with disabilities and their parents" to assure "the provision of a free and public education." 20 U.S.C. 1415(a). To determine the unique needs of each disabled child, IDEA requires the preparation of an "individualized educational plan" ("IEP") that sets performance goals for the child and objective criteria and evaluation procedures for determining whether the child is progressing at a proper rate. 20 U.S.C. 1414. Written prior notice to parents is required whenever a school either "proposes to initiate or change" or "refuses to initiate or change" the "identification, evaluation, placement, or provision of special educational services for the child." 20 U.S.C. 1415(b)(3). This notice must be fully informative, and parents must have an opportunity to present complaints about the IEP. 20 U.S.C.

1415(b)(3)-(7). When complaints are forthcoming, "the parents shall have an opportunity for an impartial due process hearing," which is typically provided by the local educational unit, 20 U.S.C. 1415(f), and for an impartial review on appeal to a State educational agency. 20 U.S.C. 1415(g).

At due process hearings held under IDEA, any party "shall be accorded" the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). At least since 1981, the Department of Education has consistently taken the position that this provision authorizes non-lawyer representation at IDEA hearings, and indeed has threatened to initiate proceedings to withdraw federal funding from states that fail to permit non-lawyer representation. Brief for the United States, *In re Arons*, No. 440, Del. Sup. Ct. (Dec. 1, 1999) at 33-34 (hereinafter "U.S. Amicus Br.").

In Delaware, due process hearings are conducted by the Department of Public Instruction. App. A45-A46 (¶8). These are formal, adversarial, adjudicatory hearings held before a three-member panel appointed by the Department of Public Instruction. *Id.* Parents play no role in the selection of panel members. *Id.* The panels consist of an attorney (who is always the chair), an educator (generally a professor of special education or a related field at a Delaware college or university), and a lay person. *Id.* The parties consist of parents, who are not generally represented by lawyers; the local school board, which is always represented by counsel; and the Department of Public Instruction, which generally is also represented by counsel. *Id.* (¶11). Because due process hearings involve complex factual questions relating to the unique learning needs of the disabled child, the hearings often last several days. *Id.* The hearings begin with opening statements from each party.

Id. at A47 (¶13). Evidence is then presented through the testimony of witnesses, who are subject to direct and cross-examination. *Id.* Although the rules of evidence do not strictly apply, the Chair rules on legal issues, the qualifications of experts, and objections to relevance, materiality, and admissibility. *Id.* (¶¶12-13). Following the presentation of evidence, the parties make closing statements and then submit post-hearing briefs and memoranda. *Id.*[1]

B. Proceedings Before The Board On The Unauthorized Practice Of Law.

On August 8, 1996, respondent Office of Disciplinary Counsel ("ODC"), an arm of the Delaware Supreme Court, filed a charge with the Board on the Unauthorized Practice of Law of the Supreme Court of Delaware ("Board") alleging that petitioners had violated Delaware's UPL rules by representing families of children with disabilities in five IDEA hearings. Ms. Arons and Ms. Watson acknowledged that they had, in fact, represented these parents, but denied that their activities constituted the *unauthorized* practice of law because IDEA explicitly authorizes representation by non-lawyer experts. Petitioners pointed out as well that every other state permits lay representation of parents in IDEA proceedings and that the United States Department of Education, the agency charged with administering IDEA, has long held the position that the Act authorizes non-lawyer advocacy. Because the pivotal issue was a legal one — namely, whether IDEA authorizes non-lawyer representation — the parties agreed that they would

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[1] Parents who do not prevail in the administrative process have the right to seek judicial review. 20 U.S.C. 1415(i)(2). Ms. Arons and Ms. Watson do not claim a right to represent parents in court proceedings.

submit a Stipulation of Facts to the Board in lieu of a formal hearing. App. A43 (Stipulation); A54 (Amendments to Stipulation).

The Stipulation establishes a number of facts relevant to this Petition. To begin with, the charges brought against Ms. Arons and Ms. Watson were not made by dissatisfied clients who were duped by imposters masquerading as lawyers. Rather, the charges were initiated by the school boards — the parents' opponents in these hearings. App. A43-A44 (¶2). The parents sought out Ms. Arons' and Ms. Watson's assistance, this assistance was provided free-of-charge, the parents were advised at the outset that they were not lawyers, and the parents "believe that their position was effectively presented in the due process hearings." *Id.* at A51 (¶¶29-32). Each of the parents had sought to obtain counsel but had been unable to find any lawyer to assist them on a fee-for-service, reduced cost, or *pro bono* basis. *Id.* at A50 (¶21). Nor is there any dispute that, but for Ms. Arons' and Ms. Watson's assistance, the parents would have foregone their statutory right to contest decisions by the school board. *Id.* at A50-A51 (¶27-28). As the parties stipulated, the parents would have done so, not because their claims lacked merit, but because (1) they "were intimidated by the formality and complexity of due process hearings," (2) they did not have "grounding in the technical issues that lay at the core of their disputes with the local school boards to enable them to handle the hearings *pro se*," and (3) the hearings "placed them in an adversary posture against two instrumentalities of government, each represented by lawyers." *Id.*

Finally, there is no question that non-lawyers like Ms. Arons and Ms. Watson are competent to advocate effectively on behalf of families with disabled children. To be effective, an advocate at an IDEA hearing must be familiar with the

clinical aspects of the child's condition (skills that lawyers ordinarily lack), as well as the rules governing the conduct of the hearing. *Id.* at A47-A48 (¶14). Non-lawyers with "special knowledge and training with respect to the problems of children with disabilities" are fully capable of presenting the parents' case to the panel. Indeed, Ms. Arons and Ms. Watson obtained significant relief in each of the five cases at issue here, even though they were matched against members of the Delaware Bar. *Id.* at A52 (¶33); *see also id.* at A56 (¶6)

After reviewing the stipulated record and detailed briefs, and hearing argument from counsel, the Board issued its Findings and Recommended Disposition. *In re Arons,* No. UPL-4, 1996 (App. 16). The Board began by rejecting Petitioners' argument that IDEA entitles lay advocates to represent parents in IDEA proceedings. The Board reasoned that the statutory "accompany and advise" language falls short of an authorization to non-lawyers to actually "represent" parents in due process hearings. *Id.* at A27-A29. In so ruling, the Board refused to defer to a 1981 opinion letter issued by the Department of Education because it disagreed with the Department's legal analysis. *Id.* at A31-A36. In light of its reading of the Act, the Board rejected Petitioners' preemption analysis, concluding that IDEA did not "override Delaware's regulatory authority" over the unauthorized practice of law. *Id.* at A36. The Board left unaddressed Petitioners' contention that enforcing Delaware's UPL rules to bar non-lawyer advocacy would frustrate IDEA's goal of enabling parents to challenge school board decisions that were adverse to their children. The Board recommended that the Delaware Supreme Court direct

Ms. Arons and Ms. Watson to cease "the unauthorized practice of law in the State of Delaware." *Id.* at A42.[2]

C. Proceedings Before The Delaware Supreme Court.

After Petitioners filed their appeal to the Delaware Supreme Court, the United States sought, and was granted, leave to appear as an *amicus curiae*. Its brief explained that its "[p]articipation in this case is particularly important since it involves a fundamental issue relating to the purpose of the Act, as well as the procedural protections the Act guarantees parents of children with disabilities. The assistance of informed lay persons for parents without counsel is critical to parents' ability to protect fully their children's right to an education guaranteed by IDEA." U.S. Amicus Br. at 1-2.

The Delaware Supreme Court affirmed. Petitioners' main argument, joined by the United States, was that IDEA entitles non-lawyers "with special knowledge or training" to advocate on behalf of parents because: (1) section 1415(h)(1) uses the same language to authorize lay experts as to authorize attorneys to act on behalf of parties at due process hearings; and (2) forbidding lay representation at IDEA hearings would lead to an absurd result — namely that parents, who have the right to question witnesses and present evidence at hearings, would simply serve as conduits for the expert's questions and evidence, leading to a time-consuming and cumbersome charade. Petitioners and the United States also emphasized that, if there were any questions about the clarity of the Act, the

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[2] All of Petitioners' federal statutory and constitutional arguments were timely raised before the Board and were properly preserved before the Delaware Supreme Court.

court should defer to the consistently-held position of the Department of Education that the Act authorizes non-lawyer representation. And finally, Petitioners urged that permitting Delaware to invoke its UPL rules in the context of IDEA due process hearings would threaten the Fourteenth Amendment guarantees of due process and equal protection, a threat which the Act should be construed to avoid.

The court rejected these arguments. Initially, it found IDEA's language "ambiguous to the extent it appears to confer joint authority on lawyers and non-lawyers to accompany and advise parents." App. at A6. Resolving this ambiguity in ODC's favor, the court relied mainly on *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 48 (3d Cir. 1988), which held that non-lawyer advocates may not seek attorney's fees under IDEA and, in *dicta*, suggested that IDEA does not authorize non-lawyer representation in due process hearings. *Id.* at A6-A8. The court also reasoned that a passage in the IDEA's legislative history lent strength to the conclusion that IDEA's drafters envisioned different roles for lawyers and non-lawyer experts in IDEA hearings, with lawyers serving traditional representational functions and experts rendering advice. *Id.* And the court refused to defer to the Department of Education's reading of the Act, both because it was set out in an opinion letter, not a regulation, and because it found the Department's analysis unpersuasive. *Id.* at A9-A10.

The court next rejected Petitioners' argument that the Act should be read to permit lay representation in IDEA hearings to avoid running afoul of the due process and equal protection guarantees of the Fourteenth Amendment. *Id.* at A11-A14. The court agreed that the interests at stake were "substantial," and that its ruling would result in some parents forfeiting "their statutory right to contest changes to their child's education plan because they cannot afford legal counsel

and will opt not to proceed *pro se* due to the complexity of the hearings and the prospect of facing two sets of government lawyers." *Id.* at A13. Nonetheless, the court concluded that Delaware's interest in the regulation of the practice of law "significantly outweighs any potential benefit that some individual parents and children may obtain through the services of lay advocates." *Id.*

Petitioners' final line of argument, also supported by the United States, was that the doctrine of implied preemption prohibited the application of Delaware's UPL rules to bar non-lawyer experts from representing parents in IDEA due process hearings. Based on its expertise in the administration of the Act, the United States argued that enforcement of Delaware's UPL rules would thwart the fulfillment of the important federal objectives embodied in IDEA, and thus State law had to yield. The Delaware Supreme Court did not address this argument.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted because the decision below egregiously misreads a pivotal provision of IDEA — the provision that safeguards the right of parents to contest adverse school board decisions. IDEA is an important federal statute on which tens of thousands of parents depend to ensure that their disabled children receive an appropriate education, and the provision at issue here is integral to IDEA's effective operation. That is not only Petitioners' view; it is the position of the United States Department of Education.

Nonetheless, according to the court below, nothing in IDEA limits the ability of any state to enforce its UPL rules in a manner that forces parents either to handle IDEA due process hearings *pro se* or to forfeit their rights to a hearing altogether. That reading (1) conflicts with IDEA's plain language, which

says that parents may be accompanied *both* by lawyers and by non-lawyer experts and makes no distinction between the functions lawyers and non-lawyers experts may perform; (2) disregards the Department of Education's judgment that IDEA authorizes lay representation; and (3) raises intractable due process and equal protection problems because it allows a state — which has a substantial financial stake in the outcome of IDEA due process hearings — to stack the deck decisively in its favor.

Compounding its error, the court below turned a deaf ear to the argument that depriving parents of non-lawyer representation subverts IDEA's core goal of empowering parents to challenge school decisions denying their child an educational opportunity. Without an advocate to take on their cause, parents will abandon their statutory right to contest adverse decisions by school authorities. Who can blame them? In Delaware, due process hearings are complex, formal, and highly adversarial, and parents of modest means and limited education cannot be expected to willingly take on two sets of government-paid lawyers. Despite this Court's admonition in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) that the agency responsible for implementing a statute "is uniquely qualified to determine whether a particular form of state law" frustrates federal objectives, the court below failed to heed the Department's warning and left the issue unaddressed. Because the ruling below frustrates a core goal of IDEA, review by this Court is warranted.

A. IDEA Guarantees Parents The Right To Have Non-Lawyers Advocate On Their Behalf In Due Process Hearings.

1. At the heart of IDEA are the procedural safeguards that enable parents to participate in the development of an

educational program appropriate to the needs of their disabled children. *See* 20 U.S.C. 1415(h). Pivotal among these safeguards is the right to file a "complaint" and have an "impartial due process hearing" if parents are dissatisfied with "any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate education" for their child. *See Board of Educ. v. Rowley,* 458 U.S. 176, 182-83, 204-205 (1982); 20 U.S.C. 1415(b)(6) and (f).

The key to this case is the meaning of subsection 1415(h)(1), and "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE, Sylvania, Inc.,* 447 U.S. 102, 108 (1980). The language of IDEA could hardly be clearer. Section 1415(h)(1) gives parties the "right to be accompanied and advised" not only by counsel but also "by individuals with special knowledge and training." The Act draws no distinction between the two, treating lawyers and specialized lay advocates exactly the same. The next provision of the Act, subsection 1415(h)(2), says that parties have "the right to present evidence and confront, cross examine, and compel the attendance of witnesses." These rights are conferred on *parties,* not their counsel or representatives, which underscores that the Act makes no distinction between lawyers and lay representatives or limits the activities of the latter. Lawyers may take on the duties authorized by section 1415(h)(2) because their clients are "accompanied and advised" by them under section 1415(h)(1). Because that is the case, then, by dint of the same operative language, lay advocates who possess special knowledge and training may undertake the same duties. No other plausible conclusion can be drawn from this provision.

2. Petitioners' reading of IDEA is confirmed by the Department of Education. Twenty years ago, after 1415(h)(1)

was added by the 1975 amendments to the Act, the State of Washington asked for a "legal analysis regarding the role of lay advocates in educational agency administrative hearings" conducted under IDEA. *Letter of Theodore Sky, Acting General Counsel, Department of Education, to the Honorable Frank B. Brouillet, State of Washington*, at 1 (April 8, 1981). The State maintained that the Act's language suggested that non-lawyers were not in fact authorized to engage in activities that are conventionally thought of as legal representation, such as examining and cross-examining witnesses. The Acting General Counsel of the Department of Education rejected this reading of the Act in a detailed opinion letter, concluding that "lay advocates are permitted to represent parties at [IDEA] administrative hearings and appeals." *Id.* at 4.[3]

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[3] The Department of Education has consistently interpreted the Act to permit non-lawyer representation. *See, e.g., Request of Eig*, EHLR [1987 Transfer Binder] 211:270, Supp. 57 (CCR); *Virginia Department of Education*, EHLR [1987 Transfer Binder] 257:349, Supp. 84 (CCR). The Department's position is also reflected in its IDEA regulations, which require public agencies, when giving notice to parents of due process hearings, to inform parents "of any free or low-cost legal *and other relevant services* available in the area." 34 C.F.R. 300.506(c) (emphasis added). The Department's interpretation also accords with that of the academic community. *E.g.*, Rapp, EDUCATION LAW, § 4-10.03[20][iv] at 10-568-69 (Matthew Bender & Co. 1998); Note, *Enforcing the Right to "Appropriate Education": The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103, 1111-12 n.56 (1979). And the Department's construction is consistent with the case law on this issue. *Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273, 1276 (9th Cir. 1999) (recognizing that lawyer not admitted to California bar "could

The Department gave three reasons for its conclusion. First, it noted that it is "clear from the statutory language alone that Congress contemplated that lay advocates, as well as attorneys, be permitted to play a role at such hearings, and did not distinguish between lawyers and lay advocates in defining that role." *Id.* Second, the legislative history of section 1415(h)(1) fortified the conclusion that Congress sought to authorize lay representation. Finally, at the time section 1415(h)(1) was enacted, Congress had routinely authorized the use of lay advocates in administrative proceedings under federal law, even when the hearings were conducted by State or local authorities pursuant to programs as diverse as social security, veterans' benefits, and food stamps. *Id.* at 6. Because the use of lay advocates had become "commonplace," the Department concluded that there was "no reason to believe that Congress intended to restrict representation at [IDEA] hearings and appeals to attorneys, rather than allowing for the widest possible advocacy," especially since there is "no requirement that the hearing officers conducting such proceedings be attorneys." *Id.* at 8 & n.6. As a result of the Department's ruling in this regard, for twenty years every state in the nation permitted non-lawyer representation in IDEA due process hearings.

Nonetheless, the Supreme Court of Delaware rejected the Department's reading of IDEA, concluding that the Act was ambiguous and that it owed only "modest" deference to the

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appear as a lay advocate" at IDEA hearing but could not recover attorney's fees); *Woods v. New Jersey Dep't of Educ.*, 858 F. Supp. 51, 55 (D.N.J. 1993) (attorney-client privilege attaches to communications between lay advocate and parent during IDEA hearings because "substance of [the] relationship is one of an attorney and client").

Department of Education. App. at A11. The court was wrong on both counts.

a. As to the court's conclusion that IDEA is ambiguous, nowhere does the court offer a plausible alternative interpretation of section 1415(h)(1). ODC had contended that the Act should be read to permit lawyers only to provide representation in due process hearings, because of their inherent and presumptive representational authority. But that reading of the Act renders most of section 1415(h)(1) surplusage and places the Delaware Supreme Court's reading of section 1415(h)(1) in tension with the Ninth Circuit's ruling in *Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273, 1276 (1999), which recognized that a lawyer not admitted to California "could appear as a lay advocate" at an IDEA hearing but could not recover attorneys' fees.

The court's reading of the Act also leads to an absurd result. The Act indisputably confers on parents the right to advocate on behalf of their children at due process hearings, regardless of legal training, because they are "parties." *E.g., Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998). The Act also accords special status to individuals with expertise in the needs of disabled children and gives parents the right to be accompanied and advised by such individuals. It would be "illogical" and "absurd" to "presume that Congress would deny that [representational] function to the persons 'with special knowledge or training' that Congress designated to assist these parents." U.S. Amicus Br. at 20. It would be equally illogical for Congress to have thought that a statute was required to permit a parent to bring to a due process hearing an expert whose only function was to quietly advise the parent. Indeed, the Delaware Supreme Court's construction leads to the conclusion that non-lawyer experts may tell parents what questions to ask, what arguments to make, what evidence to

introduce, and otherwise orchestrate the parents' case, so long as they remain silent and act only through the parent. Nowhere does the court explain why Congress would have ordained such a cumbersome and bizarre process. Because the court's construction of the Act collides with the canon that statutes be read to avoid "odd" or "absurd" results, *Public Citizen v. Department of Justice,* 491 U.S. 440, 454 (1989); *Green v. Brock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989), it warrants review by this Court.

b. Equally troubling is the Delaware court's refusal to give anything but "modest" deference to the Department of Education's interpretation of the Act. The court first justifies its decision by labeling the Department's action "informal" and deprecating the Department's regulatory responsibilities under the Act. App. at A11-A12. But these suggestions are wrong, and overlook the Department's special role in IDEA's drafting and fine-tuning, *see, e.g., Honig,* 484 U.S. at 311-12; the Department's day-to-day responsibility for IDEA's implementation and enforcement, *see, e.g., id.*. at 311; *Cedar Rapids Comm. Sch. Dist. v. Garrett F.,* 119 S. Ct. 992, 998 (1999); and the Department's considered judgment that non-lawyer representation is crucial for the fair and effective administration of the Act. The Act in fact contemplates a central administrative role for the Department, authorizing it to issue "rules and regulations," 20 U.S.C. 1402(a), administer "programs and activities" to implement the Act's mandates, *id.* 1417(b), and supervise the states' compliance with various IDEA requirements. *Id.* 1411-1413, 1420; *Honig,* 484 U.S. at 310. For these reasons, this Court has always looked to the Department for guidance in cases challenging the adequacy of a state's, or a local school board's, compliance with IDEA. *See, e.g., Garrett F.*, 119 S. Ct. at 997-98 n.6; *Irving Indep. Sch. Dist. v. Tatro,* 468 U.S. 883, 891-92 & n.9 (1984).

The court's suggestion that the principles of deference this Court has developed in cases like *Chevron, USA v. NRDC,* 467 U.S. 837 (1984), and *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512-13 (1994), do not fully apply because the Department's views were set forth in an opinion letter and an *amicus curiae* brief, instead of a regulation, is also off base. This Court has said time and again that courts must enforce an agency's consistently-held construction of a statute it administers unless it is demonstrably unreasonable, even where the agency's interpretation is set forth in informal statements like opinion letters, guidance documents, and even *amicus* briefs. *See, e.g., National Fed'n of Fed. Employees v. Department of Interior,* 526 U.S. 86, 99-100 (1999); *Auer v. Robbins,* 519 U.S. 452, 462-63 (1997); *Gardebring v. Jenkins,* 485 U.S. 415, 429-30 (1988). The Department's comprehensive and consistent statements — in a detailed, nine-page opinion letter, a number of administrative orders, and a thirty-five page *amicus* brief — easily satisfy this Court's reasonableness test.

Finally, the court refused to defer to the Department of Education's interpretation of IDEA because it disagreed with the Department's legal analysis. But the Department has the far better of the argument, and the two reasons cited by the court do not justify its conclusion.

First, the court's heavy reliance on *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988), is misguided. The *only* issue presented in *Arons* was whether a lay advocate, whose authority to represent parents in IDEA proceedings was unchallenged, was entitled to seek attorney's fees for her services. The Third Circuit said no. The Third Circuit's *dicta* suggesting that non-lawyers could not represent parents in IDEA hearings is just that — *dicta*. Had the representation issue been before the court, it would

have been briefed by the parties (it was not), the Department of Education's views would have been presented to the court (they were not), and, consistent with Third Circuit precedent, the court would have accorded substantial deference to the Department's reading of the Act. *See, e.g., Connecticut Gen. Life Ins. v. Commissioner,* 177 F.3d 136, 144 (3d Cir.), *cert. denied,* 120 S. Ct. 496 (1999); *Elizabeth Blackwell Health Ctr. for Women v. Knoll,* 61 F.3d 170, 183 & n.9 (3d Cir. 1995). But the question of deference did not arise.

Second, the court cited one sentence from the Senate Conference Report that said that in IDEA hearings a party is entitled to "the right to counsel and to be advised and accompanied by individuals" expert in the problems of handicapped individuals. App. at A8. Based on this statement, the court concluded that "Congress envisioned [a clear distinction] between the representational role of lawyers and the advisory role of non-lawyers." *Id.* This ambiguous snippet from the Committee report does not support the court's conclusion. Not only has this Court repeatedly cautioned against the use of committee reports in interpreting statutory language, *see, e.g., National Fed'n. of Federal Employees,* 526 U.S. at 96; *Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 483-84 (1997), but also reliance on a committee report is especially inappropriate where, as here, there are strong contradictory signals from other legislative materials. *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 609-11 (1991). The crucial "accompany and advise" language in section 1415(h) was written by Representative Miller, who explained the language by reference to then-existing California hearing requirements, which allowed lay experts to advocate on behalf of parents. U.S. Amicus Br. at 32. This history, which speaks directly to the question of lay representation, is far more persuasive than the lone sentence in the Senate Conference Report. But even accepting the court's overstated

characterization of the Report, *Wisconsin Public Intervenor* makes plain that reliance on it here was wholly inappropriate.[4]

The court's cramped and illogical reading of the Act is a textbook example of why courts — including state courts — should defer to expert agencies rather than setting sail on their own interpretative voyage. As the Department's *amicus* brief emphasized, interpreting subsection 1415(h)(1) to permit lay representation serves IDEA's overarching goal of giving parents a say in the educational opportunities available to their disabled child. On the other hand, the court's interpretation of section 1415(h)(1) deals a body blow to the fair and effective enforcement of IDEA by placing due process hearings out of the reach of most parents. U.S. Amicus Br. at 20, 26. The court was wrong to substitute its reading of the Act for that of

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[4] In any event, fairly read, the Senate Reports support Petitioners. The Senate Committee Report simply tracks the statutory language; the Conference Report on which the court relied confirms (1) that hearings rights conferred in section 1415(h) run to parties, not to counsel; (2) that IDEA due process hearings were intended to be informal, with hearings overseen by "impartial" hearing officers who do *not* have to be lawyers or have any legal training (in Delaware two of three panel members are not lawyers); and (3) that Congress recognized that informality was important because parents could not be expected to have the resources to retain counsel, much less hire counsel *and* expert advisors. S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 47-51 (1975) *reprinted in* [1975] USCCAN 1425, 1500-03. None of these observations is consistent with the court's claim that Congress drew a distinction between the functions lawyers and non-lawyer experts may perform in IDEA hearings.

the expert agency, and this Court should grant review and correct the Delaware court's egregious misreading of the Act.

3. The Delaware Supreme Court also erred in brushing aside the serious due process concerns created by its construction of IDEA — concerns that argue in favor of interpreting the Act to permit non-lawyer representation. Petitioners' due process argument was based on the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Petitioners maintained that the interest at stake — a child's fundamental right to an education — is substantial, that the protection of lay representation could be provided to parents without cost to the state, and that, without a capable advocate at IDEA hearings, children run an exceptional risk that they will be denied educational opportunities to which they are legally entitled.

The risk of deprivation is particularly high in IDEA cases because school boards have strong financial incentives to deny costly services to disabled children. *E.g., Garrett F.*, 119 S. Ct. at 999-1000; *Tatro*, 468 U.S. at 892. Because of the stakes, the school board and the state are represented by counsel and can commit resources to the hearing that inevitably dwarf those available to parents. *Cf. Santosky v. Kramer*, 455 U.S. 745, 763 (1982). By denying parents the right to non-lawyer assistance, the ruling below magnifies the disparities between the parties to the point where parents have no reasonable chance of prevailing — no matter how meritorious their claim. No one seriously disputes that a contest between the State and school board, both represented by counsel, on one side, and a *pro se* parent on the other, would be lopsided or, as this Court put it in *Lassiter v. Deparment of Social Servs. of Durham Cty.*, 452 U.S. 18, 27 (1981), "unwholesomely unequal." Consequently, parents who cannot find or afford a lawyer, and are denied lay assistance, will either give up (as the

parents here would have done) or be hopelessly overmatched at the hearing. The guarantees of the Due Process Clause do not permit a state to stack the deck so decisively in its favor. *See Little v. Streater*, 452 U.S. 1, 21-22 (1981). To avoid this entanglement, Petitioners urged that the court apply the settled rule of construction that favors avoidance of constitutional problems. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trade Council*, 458 U.S. 568, 575 (1988).

The Delaware Supreme Court rejected this argument, concluding that the state's interest in regulating the practice of law trumped the interests of families with disabled children in having non-lawyer representation. The court's principal concern was the threat to the public posed by incompetent and unaccountable lay advocates. But this concern is overstated in the IDEA context. The plain text of IDEA sets forth an exacting standard for representation: To represent parents in IDEA proceedings, non-lawyers must demonstrate "special knowledge or training with respect to the problems of disabilities." App. at A47-48 (¶14); *id.* at A55 (¶3); Note, *Right to "Appropriate Education:" The Education for All Handicapped Children Act of 1976*, 92 Harv. L. Rev. 1103, 1152 n.56 (1979). And Delaware may hold lay advocates as accountable as lawyers by conditioning the participation of non-lawyer advocates on their willingness to comply with the Rules of Professional Conduct that bind Delaware lawyers. *See Woods v. New Jersey Dep't of Educ.*, 858 F. Supp. 51 (D.N.J. 1993).

As its final reason, the court expressed skepticism that there was, in fact, a serious and unmet need for lay assistance in Delaware IDEA hearings. In so doing, however, the court reconfigured, or simply disregarded, the evidence. The Stipulation entered into by the parties categorically states that none of the parents involved could find lawyers willing to

handle these cases on *any* basis: fee-for-service, reduced cost, or *pro bono*. App. at 50 (¶21). The *only* non-profit organization in Delaware that provides assistance to parents in IDEA cases, the Delaware Community Legal Aid Society, renders service *only* "on occasion," *only* when the Society's case-load permits the acceptance of new cases, and *only* when the case satisfies "the organization's case acceptance criteria." *Id.* at A55 (¶4). None of these parents met those criteria or asked for help at the right time, and we daresay that the same fate awaits the vast majority of parents in Delaware.[5]

The ruling of the Delaware Supreme Court jeopardizes the due process and equal protection rights of families with disabled children in Delaware — and elsewhere, should other jurisdictions follow Delaware's lead — by forcing them to make the Hobson's choice of handling a hearing *pro se* or forfeiting their right to a due process hearing. Because of the serious constitutional implications of the ruling below, review by this Court is warranted.

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[5] Perhaps as an olive branch, the court holds out the prospect of conducting a rulemaking to authorize non-lawyers to represent parents in IDEA proceedings. App. at A15. At the time of the submission of this Petition, no such proceeding has been commenced. Even were a rulemaking to take place, the right of parents to have lay advocates in IDEA hearings ought not depend on the whim of any particular state or the vagaries of state law.

B. The Ruling Below Is At Odd With Settled Implied Preemption Principles.

This Court has repeatedly held that state law must yield where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1921 (2000) (citations omitted); *Wisconsin Pub. Intervenor*, 501 U.S. at 605 (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This principle compels reversal of the decision below because the court's ruling thwarts perhaps the most basic right accorded to parents under IDEA — the right to challenge through due process hearings adverse determinations affecting their child's educational opportunities. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985); *Honig*, 484 U.S. at 311, 321; *Smith v. Robinson*, 468 U.S. 992, 1011 (1984).

This is not only Petitioners' view, it is the view of the Department of Education. In the brief filed on behalf of the Department below, the United States argued that "barring advocacy by a person 'with special knowledge or training' substantially frustrates a parent's statutory right to have meaningful input at a due process hearing." U.S. Amicus Br. at 26. The United States went on to conclude that "[b]ecause IDEA was intended to ensure the full participation of parents in all educational decisions involving their children, *see Honig*, 484 U.S. at 311, 324, and the Board's [now court's] ruling *unquestionably subverts* a parent's right to challenge such a decision during the mandatory due process hearing, it cannot stand." *Id.* at 27 (emphasis added).[6]

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[6] Should the Court harbor any doubts about the Department's position in this case, we urge that the Court solicit the Department's views before acting on this Petition.

Under this Court's rulings, the courts below were obligated to at least give weight to, if not heed, the Department's warning that barring lay representation would impermissibly obstruct the accomplishment of IDEA's purpose. For example, in *Medtronic,* 518 U.S. at 496, this Court emphasized that, because federal agencies that administer the law are "uniquely qualified to determine whether a particular form of state law" frustrates federal objectives, their views on implied preemption are entitled to considerable weight. Just last Term, the Court reaffirmed that principle in *Geier,* where the Court, in evaluating an implied preemption claim, placed considerable reliance on the views of the Department of Transportation, noting that "the agency's own views should make a difference." 120 S. Ct. at 1926. To borrow from the Court's reasoning in *Geier,* under the IDEA "Congress has delegated to the . . . [Department of Education] authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements. *Medtronic,* 518 U.S. at 496; *see id.* at 506 (Breyer, J., concurring in part and concurring in judgment)." 120 S. Ct. at 1926-27.

Review in this case is warranted because the court below not only failed to take the Department's views into account, it appeared to disregard them altogether. The result is that the fulfillment of an important provision of federal law has been thwarted by the application of inconsistent state law, despite the legion of this Court's cases holding that, under these circumstances, state law, not federal law, must yield.

CONCLUSION

For the reasons stated above, the Petition should be granted.

Respectfully submitted:

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1. Decision of the Supreme Court of the State of Delaware, issued on July 6, 2000. A1-A15.

2. Findings and Recommended Disposition of the Board on the Unauthorized Practice of Law of the Supreme Court of the State of Delaware, issued on September 24, 1999. A16-A42.

3. Stipulation, In the Matter of Arons, et al., No. UPL-4, 1999, Before the Board o the Unauthorized Practice of Law of the Supreme Court of the State of Delaware. Dated August 6, 1998. A43-A53.

4. Stipulation, In the Matter of Arons, et al., No. UPL-4, 1999, Before the Board o the Unauthorized Practice of Law of the Supreme Court of the State of Delaware. Dated June 23, 1999. A54-A57.

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

IN THE MATTER OF: MARILYN ARONS, RUTH WATSON and PARENT INFORMATION CENTER OF NEW JERSEY, INC., Respondents.

No. 440, 1999

UPL No. 4, 1996

Submitted: May 23, 2000
Decided: July 6, 2000

Before VEASEY, Chief Justice, WALSH, HOLLAND, HARTNETT,* and BERGER, Justices, constituting the Court *En Banc.*

Upon Review of the Findings and Recommended Disposition of the Board on the Unauthorized Practice of Law. Affirmed.

Mary M. Johnston, Esquire, Chief Counsel and Michael S. McGinniss, Esquire, Disciplinary Counsel, (argued), Office of Disciplinary Counsel, Wilmington, Delaware, for Appellee.

Walter Speed Rowland, Esquire, Wilmington, Delaware and David C. Vladeck, Esquire (argued) and Amanda Frost, Esquire, Public Citizen Litigation Group, Washington, D.C. for Appellants-Respondents.

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*Retired Justice sitting by designation pursuant to Del. Const. art. IV Sec. 38.

Bill Lann Lee, Esquire, Acting Assistant Attorney General, Mark L. Gross, Esquire, and Lisa J. Stark, Esquire, Department of Justice, Washington, D.C., for The United States as Amicus Curiae.

WALSH, Justice:

This is an appeal from a decision of the Board on the Unauthorized Practice of Law (the "Board"), an arm of the Supreme Court of Delaware, concluding that the appellants had engaged in the unauthorized practice of law. The appellants, supported by the United States Department of Justice as *amicus curiae*, contend that the Board erred in not recognizing their entitlement under federal law to represent parents of children with disabilities before State administrative agencies. That entitlement, it is argued, preempts state law and is supported by due process considerations. We conclude, however, that the Board's decision is supported by the evidence and free of any error of law. Accordingly, we affirm.

I

The appellants, Marilyn Arons and Ruth Watson, are, respectively, the founder and Executive Director of Parent Information Center of New Jersey, Inc. (collectively "Appellants"). The Parent Information Center is a non-profit organization founded in 1977 that provides advice, counseling and advocacy services to families of children with disabilities. On five occasions, the Center has represented families of children with disabilities in "due process" hearings held by the Delaware Department of Public Instruction pursuant to the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*[1] Four of these five hearings were

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[1]Because Delaware participates in and receives federal funds under the IDEA, proceedings governing the special

handled by Arons, while the other hearing was handled by Watson. Although neither Arons nor Watson is an attorney, both possess special knowledge and training with respect to the problems of children with disabilities.

The IDEA is intended to "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. § 1415(a). Under the IDEA, the parents of a disabled child are entitled to challenge any proposal to change or initiate, or refusal to change or initiate, the identification, evaluation, educational placement or any other aspect of the provision of a free appropriate [*4] public education service to that child. *See id.* at § 1415(b)(3). When complaints are received, "the parents involved in such complaint shall have the opportunity for an impartial due process hearing." *Id.* at § 1415(f).

Due process hearings in Delaware are conducted in a manner typical of contested, adjudicatory hearings. The parties include the parent(s), the local school board and the Department of Public Instruction. The hearing is conducted by a three-member panel consisting of an attorney admitted to practice in Delaware; an educator who is either certified in the area of special education or who has been a post-secondary educator in the area of programs for students with disabilities; and a lay person with demonstrated interest in the education of students with disabilities from an approved list compiled by the Governor's Advisory Counsel for Exceptional Citizens. Hearings are chaired by the attorney member of the panel.

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education of children with disabilities conform to IDEA requirements, as well as Delaware law.

Due process hearings usually last from two to four days. The school board and the Department of Public Instruction are always represented by counsel. The hearing begins with opening statements from each party. Evidence is then presented through witnesses, who are subjected to direct and cross-examination. Although the rules of evidence do not apply strictly, the Chair rules on legal issues, the qualification of experts and objections to relevance, materiality and admissibility. Following the presentation of evidence, the parties make closing statements and may be asked to file written submissions on key questions.

On August 8, 1996, the Office of Disciplinary Counsel ("ODC") filed a petition with the Board requesting that Arons, Watson and the Parent Information Center be declared to have engaged in activities constituting the unauthorized practice of law by representing families of children with disabilities in due process hearings. While admitting the representation of at least five such families in Delaware due process hearings, Appellants denied that their activities, even if amounting to the practice of law, constitute the *unauthorized* practice of law. They argued that section 1415(h)(1) of the IDEA permits the representations in which they have engaged and preempts any state-law proscription against the unauthorized practice of law that might otherwise apply. That section provides that any party to a due process hearing "shall be accorded .... the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." They also claimed that Delaware is alone among the fifty states in precluding non-lawyer representation in these circumstances.

The matter was submitted to the Board on a stipulation of facts, including transcripts of due process hearings, briefs, oral argument and post-hearing correspondence. On September

24, 1999, the Board issued a written opinion concluding that the IDEA does not authorize the practice of law by non-lawyers, including Appellants, in due process hearings. This appeal followed. Following the entry of this appeal, the United States Department of Justice sought leave to appear as an *amicus curiae*. Leave was granted and the Department has filed a brief in support of Appellants' position.

II

The present appeal poses the first occasion for this Court to exercise its power of review of decisions of the Board. Under Supreme Court Rule 86(e), this Court will accept factual findings by the Board so long as they are supported by substantial evidence. We review on a *de novo* basis findings by the Board related to legal issues. *See* Supr. Ct. R. 86(e). Because the parties stipulated to the facts in this matter and the only dispute relates to matters of law, this Court's review on all issues is *de novo*.

Appellants' principal argument is that the IDEA guarantees parents the right to have trained non-lawyers advocate on their behalf in due process hearings. They contend that the IDEA could hardly be clearer because it draws no distinction between counsel and "individuals with special knowledge or training with respect to the problems of children with disabilities." To the extent that Delaware law conflicts with federal law, the argument runs, Delaware law is displaced and federal law governs.

The ODC responds that the IDEA unambiguously supports *its* position. It argues that counsel have inherent and presumptive representational ability and authority, while educational consultants do not, and that the statutory language of section 1415(h) neither creates nor implies an equivalence of permissible roles for "counsel" and for "individuals with special

knowledge or training."

Appellants and the ODC each argue that the pertinent language of the IDEA in dispute -- "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities" -- unambiguously supports their respective positions. We do not share the parties' vision of clarity. In our view, section 1415(h)(1) is ambiguous to the extent it appears to confer joint authority on lawyers and non-lawyers to accompany and advise parents and others affected by the operation of the due process hearings provided under the IDEA. That being said, however, case law as well as statutory history support the ODC's interpretation.

The pertinent language of section 1415(h)(1) has been discussed by the United States Court of Appeals for the Third Circuit in *Arons v. New Jersey State Board of Education*, 3d. Cir., 842 F.2d 58 (1988). In that case, Appellant Arons sought an award of fees for her successful representation of parents in a due process hearing in New Jersey, where state law allows non-lawyers to represent parents in due process hearings. In affirming a decision of the United States District Court for New Jersey that held that the New Jersey regulation authorizing such fees permitted payment of only legal fees and not those of lay advocates, the court of appeals rejected the statutory intent argument advanced by Appellants here. The court explained:

> The carefully drawn statutory language does not authorize these specially qualified individuals to render legal services. Although the [IDEA] does give "any party to any hearing" the right to "present evidence and confront, cross-examine, and compel the attendance of witnesses," those functions are not designated to

> be performed by lay advocates. Furthermore, the statute does not use the word "represent" in subsection (d)(1), as would be expected if Congress intended to place expert and legal counsel on the same footing.
>
> Our search through the legislative history has failed to uncover any indication that Congress contemplated that the "individuals with special knowledge" would act in a representative capacity. The Senate Report describes the "individual's" role as one of consultation, with emphasis on the responsibility to identify educational problems, evaluate them, and determine proper educational placement.
>
> The provisions's [sic] text and history thus cast substantial doubt on the plaintiff's statement in her brief that "Congress intended that no distinction be drawn between lawyers and lay advocates."
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> * * *

842 F.2d at 62-63 (citations omitted).

Because the sole issue presented in *Arons* was whether a lay advocate, whose authority to represent parents in the IDEA proceedings was unchallenged, was entitled to seek fees for her services, the *Arons* holding is contextually distinct from the issue posed in this appeal. We find the analysis of the federalism issue articulated by the court of appeals to be persuasive. That court's reference to a 1975 Senate Report

discussing the IDEA[2] is arguably dicta. Nevertheless, the contents of the Senate Report describing the nonlawyer's role as one of consultation is compelling evidence that Congress did not intend non-lawyers to advocate on behalf of parents in due process hearings. *See Arons*, 842 F.2d at 62 (citing S. Rep. No. 94-168 (1975)).

Also supportive of the ODC's proposed interpretation of the IDEA are a Senate Conference Report addressing the statute and remarks made by the original author of the Senate bill, Senator Harrison Williams of New Jersey. The Conference Report states that in administrative due process hearings a party is entitled to "the right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with respect to the problems of handicapped children." S. Conf. Rep. No. 94-455 (1975). Senator Williams, in providing a detailed analysis of the legislation before the Senate on November 19, 1975, echoed those words verbatim. *See* 121 Cong. Rec. 37416. This language confirms the clear distinction that Congress envisioned between the representational role of counsel and the advisory role of non-lawyers.

Recent amendments to the IDEA further bolster the ODC's position. Pursuant to these amendments, one of the safeguards required for agencies receiving federal funds under

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[2]The Senate Report actually discusses the forerunner to the IDEA, the Education of All Handicapped Children Act ("EHA"). Because the EHA and the IDEA are identical with regard to the language relevant to the present discussion, this opinion will not draw a distinction between the two Acts and will refer to both as the IDEA.

the IDEA is the adoption of procedures by the agency "that require the parent of a child with a disability, *or the attorney representing the child*, to provide notice" to the state or local educational agency of certain information in connection with a complaint. 20 U.S.C. § 1415(b)(6) and (7) (emphasis added). The word "attorney" is an indisputable reference to a member of the Bar and not a layperson, even if that layperson possesses "special knowledge or training with respect to the problems of children with disabilities." Equally supportive of the ODC's position is the fact that while the IDEA has been amended several times since *Arons* was decided, Congress has not attempted to overrule that judicial interpretation.

Finally, Congress has explicitly included language in other federal statutes to permit lay representation where such a result was intended. *See, e.g.*, 7 U.S.C. § 2020(e)(7) (Food Stamp Act provision allowing households in certification process to "be represented by a person other than a member of the household so long as that person has been clearly designated as the representative .... and .... is an adult."). Congress obviously knows how to provide such authority when it wishes to do so. The absence of similar language in the IDEA strongly suggests that Congress chose not to create a right to lay representation in due process hearings.

Appellants place great reliance on, and request our deference to, an interpretation of section 1415(h)(1) contained in an April 8, 1981 letter of Theodore Sky, the then acting General Counsel of the United States Department of Education. That letter was written in response to a request by the Superintendent of Public Instruction for the State of Washington for a "legal analysis regarding the role of lay advocates in educational agency administrative hearings" conducted under the IDEA. The superintendent suggested that the IDEA's language indicates that non-lawyers are not in fact

authorized to engage in activities conventionally viewed as legal representation, such as examining and cross-examining witnesses. In its response, the Department of Education rejected the superintendent's reading of the IDEA, concluding that notwithstanding the Senate Conference Report and the absence in section 1415(h)(1) of the term "represent," lay advocates are permitted to represent parties at due process hearings and appeals under the IDEA.

In reaching its conclusion that section 1415(h)(1) authorizes lay representation in due process hearings, the Department of Education relied on three factors. First, it reasoned that because no "bifurcation of function" is set forth in the statute between counsel on the one hand and individuals with special knowledge or training on the other, the permissible roles of the two must be the same. Second, the Department looked to the remarks of Congressman George Miller and Senator Alan Cranston, both of California. Congressman Miller, a member of the Subcommittee on Select Education which prepared the House bill, explained section 1415(h)(1) to his colleagues by observing that parents "will have the right to be accompanied by counsel or other qualified individuals who possess 'special knowledge or training with respect to the education of handicapped children.'" 121 Cong. Rec. 25539 (1975). Senator Cranston noted that the "procedural requirements [of the IDEA] are consistent with the existing California statutory and master plan requirements on this subject," which, at the time, permitted the lay representation of parties in California due process hearings. 121 Cong. Rec. 37419 (1975). Third, the Department relied upon the fact that lay representation had been authorized by Congress for certain other types of administrative proceedings.

Because section 1415(h)(1) is arguably ambiguous, the Department's interpretation of that section is entitled to some

level of deference by this Court. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Here, however, that level of deference is modest. Where Congress has not expressly delegated "authority to an agency to elucidate a specific provision of the statute by regulation," deference is due only to a "reasonable" administrative interpretation. *Id.* at 843-44. Further, less deference is due to informal agency interpretations, such as that expressed in the Sky letter, than to formal agency regulations adopted after a notice and comment period. *See Cleary v. Waldman*, 3d Cir., 167 F.3d 801, 807-08 (1999).

Even if this Court were required to give greater deference to the Department of Education's interpretation of section 1415(h)(1), it is doubtful whether that interpretation could withstand the sheer weight of the legal and factual support for the opposite conclusion. The Department's analysis of the statute is subject to criticism. First, in concluding that the permissible roles of counsel and individuals with special knowledge or training with respect to the problems of children with disabilities must be the same, the Department overlooked the inherent and presumptive representational authority with which counsel are cloaked and non-lawyers are not. Second, the Department selectively chose statements made by two lawmakers, while placing no weight on the Senate Report, the Senate Conference Report, or the remarks of Senator Williams. Such an approach renders that aspect of the Department's analysis questionable. *See generally Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980) ("Contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."). Finally, the Department's reliance upon the fact that lay representation had been authorized by Congress for certain other types of administrative

proceedings is puzzling because as previously noted, that factor actually supports the opposite conclusion - that Congress knew how to authorize lay representation when it wished to do so.

III

In addition to their statutory interpretation argument, Appellants contend even if the IDEA does not expressly entitle them to represent parents in due process hearings, due process would be violated by forbidding parents from having non-lawyer representation in hearings under the IDEA. They note that due process hearings are formal adversarial proceedings in which the State of Delaware funds the attorneys who argue for the parents' adversaries. Denying parents and children access to "the only assistance available to them," the argument goes raises "unyielding due process problems."[3]

The parties agree that *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), governs the determination of what process is due to safeguard a child's fundamental right to education. Under *Mathews*, courts must consider: (i) the importance of the individual interest involved;

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[3]This Court has some difficulty understanding the applicability of this argument to the matter at hand. It is not alleged that forbidding parents from having non-lawyer assistance in hearings under the IDEA will deprive the Appellants of their due process rights, nor are the parents, whose rights are purportedly abridged, parties to this action. Appellants appear to be acting as surrogates in pressing the due process claim. We will address Appellants' argument, however, in the context of adopting a statutory construction that will avoid constitutional entanglements. See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988).

(ii) the value of specific procedural safeguards to that interest; and (iii) the governmental interest in fiscal and administrative efficiency. *See id.* at 335.

The ODC acknowledges that the individual liberty interest at stake in due process hearings under the IDEA is substantial. It also concedes that some parents will forego their statutory right to contest changes to their child's education plan because they cannot afford legal counsel and will opt not to proceed *pro se* due to the complexity of the hearings and the prospect of facing two sets of government lawyers. The ODC submits, however, that Appellants "grossly and unfairly" exaggerate the risk that Delaware will deprive children of that interest unless the children and their parents are allowed to be represented by lay advocates. In this regard, the ODC notes that Delaware's Community Legal Aid Society has, on occasion, provided representation at IDEA due process hearings to parents and children whose cases satisfy the organization's case acceptance criteria. The ODC further contends that the State of Delaware has a compelling interest in regulating the practice of law within its boundaries, and that this interest significantly outweighs any potential benefit that some individual parents and children may obtain through the services of lay advocates.

We agree. A balancing of the *Mathews* factors suggests that procedural due process would not be violated by forbidding parents from having non-lawyer representation in hearings under the IDEA. While there is no question of the importance of the individual interests involved, it seems clear that parties to an IDEA hearing are already provided with substantial procedural safeguards. The hearings are conducted in a manner typical of contested, adversarial adjudicatory hearings, including the direct and cross-examination of witnesses and the required exchange of witness lists and documents in advance of

the hearing.[4] While we recognize that Appellants possess some expertise in the area of the educational needs of disabled children, they admittedly lack the training and skills that lawyers are expected to exhibit in matters of evidence and procedure. Second, it seems logical that the third *Mathews* factor, i.e., "governmental interest in fiscal and administrative efficiency," would encompass this State's exclusive authority to regulate the practice of law. It would also implicate the ODC's argument that lay advocates are unregulated and, unlike members of the Bar, are not answerable to the disciplinary process that operates as an arm of this Court. This Court does not exercise its inherent authority to regulate the practice of law for the purpose of protecting the financial interests of the lawyer. Our role is to insure that the public will enjoy the representation of individuals who have been found to possess the necessary skills and training to represent others.

Finally, the record does not support Appellants' assertion that parents and children will be denied access to "the only assistance available to them." The stipulation of the parties does state that the five families represented by the Appellants looked diligently to find legal counsel to represent them on a reduced-cost or *pro bono* basis prior to obtaining Appellants' services. But the record also reflects that Delaware's Community Legal Aid Society has in the past provided representation at IDEA due process hearings to parents and children whose cases satisfy the organization's case acceptance

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[4]We also believe that the three member panel consisting of an attorney, an educator in the area of special education, and a lay person with demonstrated interest in the education of students with disabilities, affords parents an unbiased hearing and, coupled with the above mentioned safeguards, adequate structural protection.

criteria. The record further reflects that the State Superintendent of Public Instruction and the district involved are required to provide information to parents regarding the availability of free or low-cost legal services which may be available. If it could be demonstrated that an unmet need exists and that the local bar could not adequately respond, this Court would consider the adoption of a rule allowing lay representation in a certain limited class of cases. *See, e.g.*, Supr. Ct. R. 57 (permitting civil actions before Justice of the Peace Courts in which an artificial entity or public body is a party to be prosecuted and/or defended by an officer or employee of that artificial entity or public body, who need not be an attorney duly licensed to practice law in this State). At present, however, such a need has not been demonstrated.

IV

For the foregoing reasons, the language of section 1415(h)(1) cannot be interpreted as granting any clear right to lay representation. This conclusion renders moot Appellants' claim that the IDEA preempts any state-law proscription against the unauthorized practice of law that might otherwise apply to the activities of such individuals with special knowledge or training in this context. Accordingly, we affirm the decision of the Board.

BOARD ON THE UNAUTHORIZED PRACTICE OF LAW
OF THE
SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF: MARILYN ARONS, RUTH WATSON and PARENT INFORMATION CENTER OF NEW JERSEY, INC., Respondents.

No. UPL-4, 1996

(UPL File Nos. 94-12; 95-17)

Mary M Johnston, Chief Counsel, and Michael S. McGinniss (argued), Disciplinary Counsel, Wilmington, Delaware, attorneys for Petitioner Office of Disciplinary Counsel

Walter Speed Rowland, Wilmington, Delaware, and David C. Vladeck (argued) and Amanda Frost, Public Citizen Litigation Group, Washington, D.C., attorneys for Respondents Marilyn Arons, Ruth Watson and Parent Information Center of New Jersey, Inc.

Before: Samuel A. Nolen, Esquire, Panel Chair, and Cheris Dawn Congo and John W. Paradee, Esquire, Panel Members

FINDINGS AND RECOMMENDED DISPOSITION

On August 8, 1996, the Office of Disciplinary Counsel ("ODC") filed a petition with the Board on the Unauthorized Practice of Law requesting that the Board declare that respondents Marilyn Arons, Ruth Watson and Parent Information Center of New Jersey, Inc. have engaged in activities constituting the unauthorized practice of law by

representing families of children with disabilities in "due process" hearings held by the Delaware Department of Public Instruction pursuant to the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*

Respondents timely appeared and responded to the petition. While admitting the representation of at least five such families in Delaware due process hearings, respondents deny that their activities, even if amounting to the practice of law, constitute the unauthorized practice of law. It is the respondents' assertion that Section 1415(h)(1) of IDEA, 20 U.S.C. § 1415(h)(1), which provides that any party to a due process hearing "shall be accorded ... the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities ...," authorizes the representations in which they have engaged and preempts any state-law proscription against the unauthorized practice of law that might otherwise apply to the activities of such individuals with special knowledge or training in this context.

The matter was submitted to the Panel on a stipulation of facts including transcripts of due process hearings, briefs, oral argument, and post-hearing correspondence. For the reasons set forth below, we conclude that IDEA does not authorize the practice of law by nonlawyers in due process hearings.

* * *

Respondents Marilyn Arons and Ruth Watson are the founder and Executive Director, respectively, of respondent Parent Information Center of New Jersey, Inc ("Parent Information Center"). Parent Information Center is a non-profit organization founded in 1977 which provides advice,

counseling and advocacy services to families of children with disabilities. Parent Information Center operates largely through volunteers. It does not receive government or corporate funding, but derives income through membership dues (assessed on the basis of ability to pay) and contributions. Ms. Arons is an educator and curriculum specialist by training and has completed the course work necessary for a Ph.D. in Neuroscience and Education from Teachers College, Columbia University, New York. Neither Ms. Arons nor Ms. Watson is a lawyer.

IDEA was enacted with the purpose of "assur[ing] that all children with disabilities have available to them... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs" and "that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(c)(1). In IDEA, Congress devised a system of funding special education and evaluative procedures, 20 U.S.C. § 1411, and required states and localities that accept funding to create and utilize an elaborate plan for providing special education that identifies children who need special educational assistance and determines what assistance each child needs. 20 U.S.C. §§ 1412-1414.

Delaware participates in and receives federal funds under IDEA and, accordingly, conforms its proceedings governing special education of children with disabilities to IDEA requirements, as well as to Delaware law.

IDEA is intended to "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education..." 20 U.S.C. § 1415(a). States and localities must allow "the parents of a child with a disability to examine

all records relating to such child ... and the provision of a free appropriate public education to such child...." 20 U.S.C § 1415 (b)(1) "[W]ritten prior notice [must be given] to the parents of the child" whenever schools either propose to change or initiate, or refuse to change or initiate, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education service to the child (commonly referred to as the "IEP"). 20 U.S.C. § 1415(b)(3)(B). The parents must have the "opportunity to present complaints with respect to any matter" relating to the IEP. 20 U.S.C. § 1415(b)(6). When complaints are received, "the parents involved in such complaint shall have an opportunity for an impartial due process hearing," 20 U.S.C. § 1415(f), and for an impartial review on appeal to a state educational agency. 20 U.S.C. § 1415(g). IDEA specifies, among other things, the following procedural rights of parties to IDEA due process hearings:

> Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded--
>
> > (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
> >
> > (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

> (3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and
>
> (4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 1412(a)(2 1) of this title).

20 U.S.C. § 1415(h).

Consistent with its obligations under IDEA, the Delaware Department of Public Instruction provides due process hearings to address the complaints of parents relating to IEPs. Detailed regulations address the initiation of such hearings, the composition and qualifications of the hearing panel and its members, the conduct of the hearing and the rights of the parties thereto. Delaware Administrative Procedures Manual, 72 000 CDR 002-75 through -78 (Weil Pub. 1996). These regulatory requirements mirror IDEA in providing that "Any party to a hearing has the right to: (1) be accompanied and advised by counsel or [sic] by individuals with knowledge or special training with respect to the problems of students with disabilities; [and] (2) present evidence, confront, cross-examine

and compel the attendance of witnesses...." *Id* at 002-77.

The State Superintendent of Public Instruction and the district involved are required to provide information regarding the availability of free or low-cost legal services which may be available. *Id.* at 002-75, 002-77-78. Insofar as the record discloses, however, the only legal services organization that has provided legal representation by counsel at Delaware IDEA due process hearings is Delaware's Community Legal Aid Society, Inc., which has, on occasion, provided representation at IDEA due process hearings to parents and children whose cases satisfy the organization's case acceptance criteria.

Due process hearings are conducted in a manner typical of contested, adversarial adjudicatory hearings. The parties consist of parents; the local school board, which is always represented by counsel; and the Department of Public Instruction, represented by a lawyer from the Office of Attorney General. The hearing panel must consist of one attorney admitted to practice in Delaware; one educator certified in the area of special education or who has been a post-secondary educator in the area of programs for students with disabilities; and one layperson with demonstrated interest in the education of students with disabilities who is included on an approved list compiled by the Governor's Advisory Council for Exceptional Citizens. Hearings are chaired by the attorney member of the panel, who is charged with writing the panel's decision. Although the rules of evidence do not strictly apply, the Chair makes rulings on matters such as (i) objections (*e.g.*, relevance, materiality, and admissibility); (ii) issues of law (*e.g.*, burden of proof); and (iii) qualifications of experts. In advance of the hearing, exhibits must be marked and the parties must exchange witness lists and all documents to be offered.

Due process hearings begin with opening statements

from each party. Because the school board bears the burden of going forward, it presents its case first. Evidence is presented through witnesses, who are subjected to direct and cross examination. After the school board rests, the Department of Public Instruction is afforded an opportunity to present its case. The parents put their case on last, although there is then an opportunity for rebuttal testimony. Following the presentation of evidence, the parties give closing statements to the panel and may be asked to file written submissions on key questions. On average, hearings last from two to four days.

Although due process hearings have the trappings of formal adjudications, the issues presented for resolution typically involve complex factual questions relating to the unique learning needs of the disabled child. The fact witnesses who appear at these hearings are typically school officials (teachers, guidance counselors, and principals), and the expert witnesses are generally neurologists, psychiatrists, psychologists, physicians, and others with expertise in educational and developmental sciences.

Ms. Arons and Ms. Watson are nonlawyers with "special knowledge or training with respect to the problems of children with disabilities." As part of their advice, counseling and advocacy services to families of children with disabilities, respondents frequently represent such families in IDEA due process hearings. Parent Information Center has handled approximately 500 due process hearings on behalf of families of children with disabilities, mostly in New York and New Jersey but also in Pennsylvania and, on at least five occasions, in Delaware.[1] It is not asserted that the families of children with

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[1]In Delaware hearings relating to Nicholas DeCrease, Kevin Coale, Matthew Hayes and Shawn White were handled

disabilities whom respondents have represented at due process hearings in Delaware believed that respondents were lawyers, or that respondents held themselves out as such. Indeed it is stipulated that these families sought legal counsel, but could not find an attorney willing to represent them on a standard fee-for-service basis, or to represent them on some reduced cost or pro bono basis. At the Delaware due process hearings identified above, Ms. Arons or Ms. Watson presented the parents' positions to the panel, including by making opening statements, examining and cross-examining witnesses, making and arguing evidentiary objections, introducing exhibits, proffering other records and documents, presenting procedural motions such as motions for summary judgment, submitting briefs and other documents and arguing for particular remedies.

In challenging respondents' representation of parents in due process hearings, ODC does not seek to prove that the respondents did not provide diligent and effective service to she families involved. For their part, respondents do not argue that their role in the due process hearings at issue did not constitute the "practice of law," which in any event is commonly understood to include such activities as those engaged in by respondents and listed above in their "'pursuit, as an advocate for another, of a legal remedy within the jurisdiction of a quasi judicial tribunal.'" *Delaware State Bar Ass'n v. Alexander*, Del. Supr., 386 A.2d 652, 661 (1978), *quoting Tumulty v. Rosenblum*, N.J. Supr., 48 A.2d 850, 852 (1946). Accordingly, the central issue for our decision is whether IDEA preempts the Delaware Supreme Court's authority to prohibit nonlawyers from practicing law in due process hearings by virtue of the provision in 20 U.S.C. § 1415(h)(1) requiring that parents be

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by Ms. Arons. The hearing in Delaware relating to Phillip Russ was handled by Ms. Watson.

accorded "the right to be accompanied and advised ... by individuals with special knowledge and training with respect to the problems of children with disabilities."

* * *

The Delaware Supreme Court has inherent jurisdiction over the practice of law within Delaware. *Delaware State Bar Ass'n v. Alexander*, 386 A.2d at 654; *In re Appeal of Infotechnology, Inc.*, Del. Supr., 582 A.2d 215, 220 (1990); *In re Petition of Nenno*, Del. Supr., 472 A.2d 815, 819 (1983) (noting significance of separation of powers doctrine). While aspects of the Court's authority are referenced by statute, *see, e.g.*, 10 *Del. C.* § 1906, the source of this inherent authority rests in the jurisprudence of England transplanted to the Colonies prior to the time of their separation from the Crown. In view of the exhaustive treatment of this subject by the Supreme Court in *Delaware Optometric Corp. v. Sherwood*, Del. Supr., 128 A.2d 812, 815-817 (1957), it is unnecessary to recount in detail the historical development of authorization or licensure to practice law as a prerequisite to practice that profession. It is pertinent to observe, however, that from early times it has been recognized as necessary to the public welfare to regulate and oversee those who seek to represent the interests of others before tribunals. *Delaware Optometric Corp. v. Sherwood*, 128 A.2d at 816. As our Supreme Court has found:

> The justification for the existence of this [regulatory] power inherently in the courts is the necessity for the proper administration of justice, which can be achieved only if the procedures and practices of the courts are fair and reasonable, and the officers of the court, the lawyers, are competent and ethical. Thus it is that by rule of court requirements are

> established for admission to the Bar, and standards of ethical conduct established, to which all lawyers must conform to continue in the practice of law. The policing of these requirements is achieved by the inherent power of the court to discipline lawyers for violations.

In re Member of the Bar, Del. Supr., 257 A.2d 382, 383 (1969).[2]

Under the common law rule thus in existence in Delaware since before the separation of the Colonies from the Crown, the "admission of attorneys to practice, and the

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[2]There are, of course, those who portray limitation of the right to practice law as monopolistic or oligarchic economic protectionism benefitting those already authorized to practice. While not explicitly advanced by respondents as an argument, it is alluded to in the briefing. ("The purpose of UPL laws is to protect the public, not to preserve the lawyer monopoly over the delivery of legal services.") This is not a pertinent consideration in the case before us; the stipulated facts establish that there was no universe of lawyers willing to take on the cases handled by respondents on a standard fee-for-service basis. It would in any event not be a pertinent consideration in Delaware since, at least in Delaware, it is well established that the right or authority to practice law is not a franchise which may be protected as a property right against competition. *Delaware Optometric Corp. v. Sherwood*, 128 A.2d at 817 ("The lawyer's license ... is not the grant of a property right which the individual may protect by injunction [against unauthorized competition]. To regard it otherwise is to make the legal profession a business, and to destroy the very reason for its existence").

exclusion of unauthorized persons from practice lie within the province of [the Supreme] court. A violation of [the Supreme] court's exclusive right to license attorneys at law by presuming to practice law without such license is a contempt of its authority and punishable as such." *Delaware Optometric Corp. v. Sherwood*, 128 A.2d 816-17.[3]

The policing of the Bar and, thus, of the practice of law in general takes numerous forms. For example, as the Court itself noted in upholding mandatory annual assessments for the benefit of the Clients' Security Trust Fund (now known as the Lawyers' Fund for Client Protection):

> It must be borne in mind that lawyers, constituting the Board of Bar Examiners by appointment of this Court, control admissions to the Bar. In a sense, therefore, the profession holds out to the public all its members in good standing as being competent, honest and devoted to their clients' interests. This, it seems to us, is in the nature of a collective representation by the Bar to the public, and justifies a collective acceptance of responsibility when one of its members is false to his oath and the common precepts of honesty.

In re Member of the Bar, 257 A.2d at 3 83. Similarly, lawyers are subject to detailed rules of professional conduct (*see* Delaware Lawyers' Rules of Professional Conduct), rules

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[3]This approach is not unique to Delaware, but widely accepted in many other states. *See In the Matter of Thomas Alexander Jr.*, Bd. on the Unauthorized Practice of Law, UPL-2, 1992 (July 8, 1993) (Opinion) and cases collected therein.

requiring continuing education (*see* Delaware Rules for Mandatory Continuing Legal Education), annual registration requirements (see Supreme Court Rule 69), rules relating to abandoned or unclaimed client trust funds (*see* Supreme Court Rule 73), rules governing segregation of and accounting for client funds (*see* Rule 1. 15, Delaware Lawyers' Rules of Professional Conduct), and rules restricting and regulating advertising and other communications about legal services that might create unjustified expectations or that might otherwise mislead (*see* Rules 7.1 - 7.5, Delaware Lawyers' Rules of Professional Conduct). It is undisputed that these restrictions, limitations, requirements and client protections are not generally applicable to nonlawyers.

Respondents' contention that their practice of law without admission to practice nonetheless constitutes the authorized practice of law under IDEA rests principally upon their assertion that (i) 20 U.S.C. § 1415(h)(1) on its face authorizes "individuals with special knowledge or training with respect to the problems of children with disabilities" to represent parties to due process hearings, by virtue of its conferral of a right to such parties to be accompanied and advised by such individuals, and (ii) IDEA thereby preempts under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, the traditional regulation of the practice of law by the Delaware Supreme Court.

We do not read Section 1415(h) as providing that a party to a due process hearing may be "represented" by individuals with special knowledge or training with respect to the problems of children with disabilities. It provides only that a party may be "accompanied and advised" by such persons. Where Congress (or an agency to which Congress has granted clear regulatory authority) has intended to allow representation of parties by nonlawyers in administrative or other proceedings,

it has been explicit in its language doing so. *See, e.g., Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 384 (1963) (statute providing that the Commissioner of Patents "may prescribe regulations governing the *recognition* and conduct *of agents*, attorneys, *or other persons* representing applicants or other persons before the Patent Office" authorized Commissioner to provide by regulation that patent applicant "*may be represented by an attorney* or *agent* authorized to practice before the Patent Office") (italics in opinion); 7 U.S.C. § 2020(e)(7) (1988) and 7 CFR § 273.15(p)(2) (Food Stamp Act provision and regulation allowing "households" in certification process to "be represented ... by a person other than a member of the household so long as the person has been clearly designated as the representative ... and ... is an adult" and in grievance proceedings to "present the case or have it presented by a legal counsel or other person"); 45 CFR § 205.10(a)(3)(iii) (1997) (provision regulating state plans under Social Security Act allowing applicants and recipients to be "represented by an authorized representative, such as legal counsel, relative, friend or other spokesman"); 38 U.S.C. § 5904(a) ("The Secretary may recognize any individual as an agent or attorney for the preparation, presentation and prosecution of claims under laws administered by the Secretary" relating to veterans' benefits). In IDEA, by contrast, Congress did not clearly reflect by the words chosen that lay representation was being authorized. Rather, it used words -- "accompanied and advised" -- which do not ordinarily convey the concept of representation.[4]

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[4]We do not accept the argument that, in lumping "counsel" and "individuals having special knowledge or training" together in Section 1415(h)(1), the statutory language implies an equivalence of permissible roles for the two categories of persons. Counsel have inherent and presumptive representational authority, while individuals with special

Accordingly, we find that the plain language of Section 1415(h)(1) does not authorize individuals having special knowledge or training with respect to the problems of children with disabilities to represent parties in due process hearings.

While it is a basic tenet of statutory construction that resort to extrinsic aids to construction is unnecessary in the absence of ambiguity, and we find no ambiguity in the carefully drawn language of the statute, we note that the Joint Explanatory Statement of the Committee of Conference set forth in the Senate Conference Report, which addressed IDEA (then known as the Education of All Handicapped Children Act) as finally adopted, explained the due process provisions as providing the "right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with respect to the problems of handicapped children." S. Conf. Rep. No. 94-445, reprinted in 1975 U.S.C.C.A.N. 1480, 1503. This language confirms the clear distinction between the representational role of counsel and the advisory role of nonlawyers which we perceive.

Our finding is consistent with that expressed by the United States Court of Appeals for the Third Circuit in *Arons v. New Jersey State Board of Education*, 842 F.2d 58 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988). There, Ms. Arons sought an

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knowledge or training with respect to the problems of children with disabilities do not. Indeed, it is an ancient and original function of counsel to represent others in pleading cases -- to stand in the client's stead -- while it is no traditional part of the role of individuals with special knowledge or training in the problems of children with disabilities to do so, so far as this record reveals. Congress may be presumed to have understood this.

award of fees for her successful representation of parents in a due process hearing, but was denied fees on the ground that the New Jersey regulation authorizing such fees permitted payment only of legal fees, and not fees of lay advocates.[5] Ms. Arons appealed, arguing that the no-lay-fee rule stood as an obstacle to the full accomplishment of the IDEA objectives (because the rule would discourage parties from using nonlawyer representatives which Ms. Arons claimed (and here claims) Section 1415(h)(1) authorized) and was therefore preempted by IDEA.

The Third Circuit squarely rejected this view. It said:

> The carefully drawn statutory language does not authorize these specially qualified individuals to render legal services. Although the Act does give "[a]ny party to any hearing" the right to "present evidence and confront, cross-examine, and compel the attendance of witnesses," Id. § 1415(d)(2) [now (h)(2)], those functions are not designated to be performed by lay advocates. Furthermore, the statute does not use the word "represent" in subsection (d)(l) [now (h)(l)], as would be expected if Congress intended to place expert and legal counsel on the same footing.
>
> Our search through the legislative

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[5]By regulation, New Jersey permits -- as a matter of state law -- the representation of parents in due process hearings by nonlawyers. Indeed respondents advise that Delaware is alone among the fifty states in precluding nonlawyer representation in these circumstances.

> history has failed to uncover any indication that Congress contemplated that the "individuals with special knowledge" would act in a representative capacity. The Senate Report describes the "individual['s]" role as one of consultation, with emphasis on the responsibility to identify educational problems, evaluate them, and determine proper educational placement. S. Rep. No. 168, 94th Cong., lst Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News pp. 1425, 1470-71.
>
> The provisions's text and history thus cast substantial doubt on the plaintiff's statement in her brief that "Congress intended that no distinction be drawn between lawyers and lay advocates."

842 F.2d at 62. Whether or not binding in a precedential way, we find this analysis persuasive and note that in none of the amendments of IDEA adopted since Arons was decided has Congress attempted legislatively to overrule this judicial interpretation.

Respondents argue that, notwithstanding the foregoing, we are bound to give controlling deference to an interpretation of the "accompanied and advised" language found in an April 8, 1981 letter of Theodore Sky, then Acting General Counsel of the United States Department of Education (the "Sky Letter"), in which he concluded that notwithstanding the Senate Conference Report and the absence in Section 1415(h)(1) of the term "represent," lay advocates are permitted to represent parties at administrative hearings and appeals. *Letter of Theodore Sky, Acting General Counsel, Department of Education, to the Honorable Frank B. Brouillet. Superintendent*

of Public Instruction, State of Washington (April 8, 1981).

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the United States Supreme Court addressed deference to administrative statutory interpretations. Under the Court's analysis, the first question is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter ...." 467 U.S. at 842. If the statute is silent or ambiguous on the issue, however, a court must determine whether the agency's construction is permissible. *Id.* at 843. If Congress expressly delegated "authority to the agency to elucidate a specific provision of the statute by regulation ... [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. If the legislative delegation is merely implicit, however, deference is due only to a "reasonable" administrative interpretation. *Id.* at 844. Less deference is due to informal agency interpretations, which is what is involved here, than to formal agency regulations adopted after a notice and comment period. *See, e.g., Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 807-08 (3d Cir. 1999); *Converse County Sch. Dist. No. Two v. Pratt*, 993 F. Supp. 848, 859 n. 4 (D.Wyo. 1997).

In Section 1415(h)(1) Congress has spoken directly to the precise question of who may assist parties in such hearings: counsel, who have inherent representational authority, and individuals with special knowledge or training with respect to the problems of children with disabilities, who do not. The usage of the phrase "accompanied and advised" rather than the term "represented" or words of similar import, when viewed against the long-established regulation of the practice of law under State, not federal or administrative, authority, and the evidence that Congress well knew how to authorize lay representation in clear terms when it wished to do so, establish

that Congress did not Intend to mandate a right to lay representation in due process hearings.[6] Congress chose not to include language in Section 1415(h)(1) according representational authority to the identified category of nonlawyers. Thus we conclude that, because the intent of Congress is clear, deference to the conclusion stated in the Sky Letter is not required.

Even if the Congressional intent were less than clear, Congress did not explicitly delegate to the United States Department of Education the responsibility to determine issues of authority to practice law, that is, to elucidate whether under the "accompanied and advised" clause parties to due process hearings are entitled to be represented by nonlawyers. Therefore, only a "reasonable" administrative interpretation requires deference. Accordingly we next review the Sky Letter's analysis of the question.

In reaching its conclusion that Section 1415(h)(1) authorizes lay representation in due process hearings the Sky Letter relied on three factors. First, it reasoned that because no "bifurcation of function" is set forth in the statute between counsel on the one hand and individuals with special

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[6]The ease with which Congress could have made its intention clear had it wished to authorize lay representation is illustrated by the approach taken in the New York Administrative Code, which provides that "the parties to the proceeding may be *represented* by legal counsel or by individuals with special knowledge or training ... and may be accompanied by other persons of their choice." *Connors v. Mills*, 34 F. Supp. 2d 795, 807 (N.D.N.Y. 1998), *quoting* N.Y. Comp. Codes R. & Regs. tit. 8 § 200.5(c)(5) (1998) (italics supplied).

knowledge or training with respect to the problems of children with disabilities on the other, the permissible roles of the two must be the same. In reaching this conclusion, however, Sky overlooked the inherent and presumptive representational authority with which counsel are cloaked, traditional authority which nonlawyers simply do not share. For the reasons expressed in footnote 4 above, this factor although overlooked is highly relevant.

Second, Sky placed no weight on the Senate Conference Report, but rested his interpretation on the remarks of a single Senator (Senator Cranston), who noted that the "procedural requirements [of IDEA] ... are *consistent* with the existing California statutory and master plan requirements on this subject." 121 Cong. Rec. 37418-9 (1975) (italics ours). Sky then observed that under California practice at the tune, lay advocates represented parties in California due process hearings.[7] Leaving to one side reliance upon a general statement of procedural *consistency* between two statutory schemes to prove an intention that there be *identity* between the two schemes on a narrow and specific subsidiary point, Sky's reliance on the remarks of a single Senator to the exclusion of a distinction evident in the Senate Conference Report renders his analysis unpersuasive. *See Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102 (1980) ("[C]ontemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative

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[7]Subsequently, however, it has been held that not even an attorney may appear in a representative capacity at a due process hearing unless he or she is a member of the California Bar. *See Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273 (9th Cir. 1999).

history").[8] The "well-established presumption that Congress is understood to legislate against a background of common-law principles," of which the "rule that a non-lawyer may not represent another person in court is a venerable [one]" would to the contrary lead a court a court to be "reluctant to assume, absent strong evidence to the contrary, that Congress intended to override this well-settled rule using ambiguous statutory language " *Collinsgru v. Palmyra Bd. of Educ*, 161 F.3d 225, 231-32 (3d Cir. 1998).

Third, and finally, Sky relied upon the fact that lay representation has been authorized by Congress for certain other types of administrative proceedings. But this conclusion failed to consider that in the examples relied upon by Sky the intention to allow lay representation was explicit. Indeed it is these very examples, some of which we have detailed above in concluding that Congress knew how to authorize lay representation when it wished to do so, and others of which are self-evidently to the same effect, that demonstrate that Congress did not choose in this instance to authorize lay representation.

For these reasons we cannot conclude that the interpretation of Section 1415(h)(1) reached in the Sky Letter

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[8]Sky also failed to note or credit the remarks of Senator Williams, who (in contrast to Senator Cranston) provided a detailed analysis of the legislation and remarked, as the Senate Conference Report had, that parents would have "the right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with respect to the problems of handicapped children." 121 Cong. Rec. 37416.

is one to which we must grant controlling deference.[9] We turn next to respondents' argument that to the extent Delaware law proscribes their practice of law in due process hearings as unauthorized, principles of federal preemption arising under the Supremacy Clause of the United States Constitution override Delaware's regulatory authority.

Under principles of federal preemption, state law may be preempted in either of two general ways. First, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood v. Kerr - McGee Corp.*, 464 U.S. 238, 248 (1984), *reh'g denied*, 465 U.S. 1074 (1984). Second, if Congress "has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* (citation omitted). *See also Florida Lime & Avocado Growers. Inc. v. Paul*, 373 U.S. 132, 142-3 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In these latter categories, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Wylain. Inc. v. TRE Corp.*, Del. Ch., 412 A.2d 338, 346 (1979), *quoting Merrill Lynch, Pierce*

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[9]Two other letters expressing administrative interpretations have been brought to our attention: *Request of Eig*, EHLR [1987 Transfer Binder] 211:270, Supp. 57 (CCR Publishing Co.); *Virginia Dep't of Education*, EHLR [1987 Transfer Binder] 257:349, Supp. 84 (CCR Publishing Co.). Both are brief and conclusory, failing to express any administrative analysis which might otherwise call for deference.

Fenner & Smith Inc. v. Ware, 414 U.S. 117, 127 (1973). *See also Shamrock Assocs. v. Texas Am. Energy Corp.*, Del. Ch., 517 A.2d 658, 661-62

"Federal statutes impinging upon important state interests 'cannot ... be construed without regard to the implications of our dual system of government....'" *BEP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1993), *reh'g denied*, 512 U.S. 1247 (1994), *quoting* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-40 (1947). Thus, there is a "presumption against finding preemption of state law in areas traditionally regulated by the States." *California v. ARC America Corp*, 490 U.S. 93, 101 (1989). "As is always the case in our preemption jurisprudence," where "federal law is said to bar state action in fields of traditional state regulation ... we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997), *quoting N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travellers Ins. Co.*, 514 U.S. 645, 655 (1995). *See also Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994) ("When determining the breadth of a federal statute that impinges upon or preempts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope"). Accordingly, "where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation." *BEP v. Resolution Trust Corp.*, 511 U.S. at 546.

It is not claimed that in enacting IDEA Congress intended to occupy the field of education of children with disabilities to the exclusion of the States. Rather, respondents argue that Delaware's assertion of authority to regulate the

practice of law by prohibiting those not admitted to practice from representing parties in due process hearings conflicts directly with the mandate of Section 141 5(h)(1) according parents of children with disabilities the right, as respondents see it, to be represented by respondents as individuals with special knowledge or training with respect to the problems of children with disabilities.

It cannot be gainsaid that the regulation of the practice of law is a traditional State function -- existing indeed since the founding of the Union. Nor can it be doubted that the States have a substantial interest in the regulation of the practice of law within their borders. As the United States Supreme Court noted only months before the Education of All Handicapped Children Act (now IDEA) was adopted in 1975, "the States have a compelling interest in the practice of professions within their boundaries, and ... as part of their power to protect the public ... they have broad power to establish standards for licensing practitioners and regulating the practice of professions.... The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, *reg'h denied*, 423 U.S. 886 (1975). This compelling state interest has been recognized specifically in the IDEA context:

> The requirement of representation by counsel is based upon two cogent policy considerations. First, there is a strong state interest in regulating the practice of law. Requiring a minimum level of competence protects not only the party that is being represented but also his or her adversaries and the court from poorly drafted, inarticulate, or vexatious claims. *See Brown v. Ortho*

> *Diagnostic Sys., Inc.*, 868 F. Supp. 168, 172 (E.D.Va. 1 994) (noting that "the conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents, but also for his adversaries and the court"). ... Not only is a licensed attorney likely to be more skilled in the practice of law, but he or she is also subject to ethical responsibilities and obligations that a lay person is not. In addition, attorneys may be sued for malpractice. *See id.*

Collinsgru, 161 F.3d at 231; *see also Arons*, 842 F.2d at 63. Accordingly, in interpreting IDEA, we may find preemption of this area of "traditional regulation" or "historic police power" of the States only if we can conclude that preemption was the "manifest intent" of Congress.

For the reasons we have outlined above we cannot so conclude. First, we do not interpret the language of Section 1415(h)(1) as granting any clear right to lay representation. Thus we see no actual conflict between the state and federal schemes. *Sperry v. Florida ex rel. Florida Bar*, relied upon by respondents, likewise does not establish preemption on these facts. *See Arons*, 842 F.2d at 61-62 (analyzing *Sperry* and rejecting a similar, if not the identical, claim). It would, indeed, be contra~y to the established precepts cited above for us to interpret Section 14150(1) so expansively as to extend it beyond its evident scope into an area of traditional state regulation when we see no manifest intent of Congress that it be so extended. It is more reasonable to harmonize the state and federal schemes than to set one above the other where such is not necessary to the federal purpose. *Wylain, Inc. v. TRE Corp.*, 412 A.2d at 346.

We recognize the force of respondent's contention that

representation of families of children with disabilities by laypersons such as themselves could serve the accomplishment of the full objectives of Congress under IDEA. At least insofar as this record reflects the parties in question were unable to find attorneys who would agree to represent them on a standard fee-for-service basis, a low-cost basis or pro bono. But the mandate of Congress under Section 1415 is not that the parents of children with disabilities who disagree with an IEP receive free or low-cost representation. The Congressional mandate is that they "shall have an opportunity for an impartial due process hearing" We cannot conclude on the evidence before us that under the procedures adopted by the State that opportunity is lacking. The absence of a universe of low cost or pro bono attorneys willing to take on these cases -- which, notably, Congress sought to remedy by amending IDEA to allow an award of attorneys fees to prevailing parents while pointedly not amending Section 1415(h)(1) to clarify the claimed right to lay representation -- does not in itself demonstrate that the purpose and objectives of Congress are impeded by the traditional prohibition of legal representation of parties by persons untrained in the law.[10]

In so concluding we make no qualitative judgment concerning the efficacy of the services and advocacy respondents themselves have provided. It is no part of our task to reach such a judgment. By all accounts respondents are

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[10]Respondents fear that the prohibition against the practice of law by respondents will result in intractable due process concerns. The cases cited by respondents do not, however, lead us to conclude that there is a generalized due process right to representation by lay advocates in the context of IDEA due process hearings.

vigorous and knowledgeable advocates in the educational field in which they are active. Other lay advisors present or future may not be as knowledgeable, vigorous or able.

Nor is our task to determine whether lay representation in these circumstances should be permitted, or to fix the conditions and qualifications which might be placed upon any such lay representation. In this area as in many others there are those for whom it will be difficult to find free or affordable legal representation. Many other States -- perhaps all except Delaware — have decided to allow nonlawyer representation and have presumably settled upon schemes of regulation and oversight which they have concluded are sufficient in their local circumstances. Respondents and ODC agree that this is an issue that should be addressed, but it must be addressed to the proper body with rule-making authority and is not proper to our adjudicatory function.

* * *

Our task is to determine whether what respondents did as revealed on this record constituted the practice of law, and if so whether or not it was the authorized practice of law. We find that in representing the families of Nicholas DeCrease, Kevin Coale, Matthew Hayes, Shawn White and Philip Russ in due process hearings conducted by the Delaware Department of Public Instruction, engaged in the practice of law, that such practice of law was unauthorized inasmuch as respondents are not admitted to practice in Delaware, and that such practice of law was not otherwise authorized under IDEA or any other pertinent statute or regulation. Accordingly, we recommend that the Court enter its Order:

1. Declaring that Marilyn Arons, Ruth Watson and Parent Information Center of New Jersey, Inc., in representing

the parents of Nicholas DeCrease, Kevin Coale, Matthew Hayes, Shawn White and Philip Russ in due process hearings conducted by the Delaware Department of Public Instruction respondents engaged in the unauthorized practice of law; and

2. Directing Marilyn Arons, Ruth Watson and Parent Information Center of New Jersey, Inc. to cease and desist immediately from the unauthorized practice of law in the State of Delaware.

Rule 16 of the Board provides that "[u]nless otherwise ordered by the Supreme Court or the Board, costs ... shall be assessed against the respondent in any case where the Court determines that the respondent has engaged in the unauthorized practice of law." In so providing, Rule 16 calls for an exercise of discretion regarding the award of costs. We believe this is an appropriate case, in the exercise of that discretion, not to award costs against respondents. Respondents raised legitimate issues of significant public interest and presented a good faith defense in a highly professional manner. Accordingly, we recommend that the Order entered by the Court provide further:

3. Each party shall bear her or its own costs.

FOR THE BOARD:

Samuel A. Nolen
Hearing Panel Chair

Dated: September 24, 1999

BOARD ON THE UNAUTHORIZED PRACTICE OF LAW OF THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of: Marilyn Arons, Ruth Watson, and Parent Information Center of New Jersey, Inc.

No. UPL-4, 1996

UPL File Nos. 94-12; 95-17

STIPULATION

The Office of the Disciplinary Counsel ("petitioner") and Marilyn Arons, Ruth Watson, and the Parent Information Center of New Jersey, Inc. ("respondents"), through their undersigned counsel, hereby stipulate and agree that if an evidentiary hearing were to be held in this matter, the facts adduced would be as follows:

The Petition

1. This proceeding was initiated by a Petition filed by the Office of Disciplinary Counsel on August 8, 1996. An answer to the Petition, on behalf of all of the respondents, was timely filed on September 13, 1996. Copies of the Petition and Answer are appended hereto.

2. The Petition does not allege that the Office of Disciplinary Counsel has ever received a complaint by any parent regarding the conduct of respondents, and no such complaint has ever been received. Indeed, the only complaints petitioner has received regarding the efforts of respondents

have been made by school boards and their lawyers, who are the adversaries of these parents in the due process hearings and who have lost cases to respondents.

Nature of the Due Process Hearings

3. The gravamen of the Petition is that the respondents violated Delaware's rules against the unauthorized practice of law by assisting parents of disabled children in due process hearings held by the Department of Public Instruction of the State of Delaware.

4. The due process hearings arise under the Individuals with Disabilities Education Act ("IDEA"), a federal statute that was enacted because Congress recognized that "more than half of the children with disabilities in the United States do not receive appropriate educational services." 20 U.S.C. 1400(b)(3). IDEA was enacted with the purpose of "assur[ing] that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs" and "that the rights of children with disabilities and their parents or guardians are protected." 20 U.S.C. 1400(c). Accordingly, Congress devised a system of funding special education and evaluative procedures, 20 U.S.C. 1411, and required states and localities that accept funding to create and utilize an elaborate plan for providing special education that identifies children who need special educational assistance and determines what assistance each child needs. 20 U.S.C. 1412-1414.

5. The State of Delaware participates in IDEA and receives federal funds under IDEA. Accordingly, the due process hearings that are the subject of this proceeding must be conducted in accordance with the dictates of IDEA, *see* 20

U.S.C. 1413, 1415(a), as well as Delaware law.

6. As noted, the heart of the IDEA is the "assur[ance] that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education . . .." 20 U.S.C. 1415(a). States and localities must allow "the parents or guardians of a child with disability to examine all relevant records with respect to . . . the child and the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(1)(A). "[W]ritten prior notice [must be given] to the parents or guardian of the child" whenever schools either propose to change or initiate, or to refuse to change or initiate, the identification, evaluation, placement, or provision of special educational services for the child (commonly referred to as the "IEP"). 20 U.S.C. 1415(b)(1)(C). This notice must be fully informative to "the parents or guardian," who must have the "opportunity to present complaints with respect to any matter" relating to the IEP. 20 U.S.C. 1415(b)(1)(D) & (E). When complaints are received, "the parents or guardian shall have an opportunity for an impartial due process hearing," 20 U.S.C. 1415(b)(2), and for an impartial review on appeal to a state educational agency. 20 U.S.C. 1415(c).

7. "Any party to any [due process] hearing conducted pursuant to subsections (b) and (c) shall be accorded the right," among other things, "to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities," to present evidence and examine witnesses, to obtain a transcript of the hearing, and to obtain written findings of fact and decisions. 20 U.S.C. 1415(d).

8. Consistent with its obligations under IDEA, the Delaware Department of Public Instruction provides due

process hearings for parents who believe that their local school districts have failed to fulfill their duties under IDEA. These are formal adjudicatory hearings that are held before a three-member panel appointed by the Department of Public Instruction. Parents play no role in the selection of panel members. The panels consist of an attorney (who is always the chairperson), an educator (generally a professor of special education or related field at a Delaware college or university), and a lay person. Lay committee members are selected from a list of individuals who have passed a training course sponsored by the Department of Public Instruction. Every panel therefore consists of two nonlawyers and one lawyer.

9. The due process hearings are governed both by federal law (which is set forth above) and Delaware law, which provides that "[a]ny party to a hearing has the right to be accompanied and advised by counsel or by individuals with special knowledge or training with respect to the students with disabilities." Delaware Administrative Manual, at 85.

10. Due process hearings are conducted in a manner typical of contested, adversarial adjudicatory hearings.

11. The parties consist of parents, who, as explained more fully below, are not represented by attorneys; the local school board, which is always represented by counsel; and the Department of Public Instruction because the State ultimately bears a portion of the cost of providing a disabled child an appropriate education tailored to suit the child's unique needs. Accordingly, the State is separately represented at these hearings by a lawyer from the Office of Attorney General. Thus, due process hearings always involve at least two instrumentalities of government represented by counsel, arrayed against the parents.

12. Due process hearings are chaired by the attorney member of the panel, who is charged with writing the panel's decision. Although the rules of evidence do not strictly apply, the Chair makes rulings on matters such as (I) objections (*e.g.*, relevance, materiality, and admissibility); (ii) issues of law (*e.g.*, burden of proof); and (iii) qualifications of experts. In advance of the hearing, exhibits must be marked and the parties must exchange witness lists and all documents to be offered.

13. Due process hearings begin with opening statements from each party. Because the school board bears the burden of going forward, it presents its case first. Evidence is presented through witnesses, who are subjected to direct and cross-examination. After the school board rests, the Department of Public Instruction is afforded an opportunity to present its case. The parents put their case on last, although there is then an opportunity for rebuttal testimony. Following the presentation of evidence, the parties give closing statements to the panel and may be asked to file written submissions on key questions. On average, hearings last from between two and four days.

14. Although due process hearings have the trappings of formal adjudications, the issues presented for resolution typically involve complex factual questions relating to the unique learning needs of the disabled child. As a result, the parties' representatives must be familiar with, and able to understand, the clinical aspects of the child's condition -- skills and training which lawyers ordinarily lack. The testimony at these hearings generally focuses on the adequacy and accuracy of the school board's testing, evaluation, and diagnosis of the child's problem, and the remedial measures needed to address the child's disability. The fact witnesses who appear at these hearings are typically school officials (teachers, guidance counselors, and principals), and the expert witnesses are

generally neurologists, psychiatrists, psychologists, physicians, and others with expertise in educational and developmental sciences. Thus, nonlawyers with "special knowledge and training with respect to the problems of children with disabilities," like Ms. Arons and Ms. Watson, are fully capable of presenting the parents' case to the panel. 20 U.S.C. 1415(d).

Parent Information Center of New Jersey, Inc.

15. The Parent Information Center of New Jersey ("PIC") is a non-profit organization that was founded in 1977 by respondent Marilyn Arons, a public school teacher and curriculum specialist, who has completed all of her course work for a Ph.D. in Neuroscience and Education from Teachers College, Columbia University, in New York. PIC provides advice, counseling, and, at times, advocacy services to families who have children with disabilities. PIC's work is performed almost entirely through its staff of unpaid volunteers and operates out of the homes of its family/volunteer members. PIC receives no government or corporate funding, and its shoe-string budget consists of contributions and membership dues from individuals. Annual membership dues are set on a sliding scale according to ability to pay. Those who can afford it pay $100, and those of more modest means can pay as little as a quarter. Although PIC began in New Jersey, it now does extensive work in New York State, and it has branched out as well to other states, including Pennsylvania and Delaware. Over the past twenty years, PIC has assisted parents on over 20,000 occasions, ranging from crisis intervention, counseling, and assistance in negotiating IEPs with local school boards to handling due process hearings. Parents hear of PIC through word of mouth and are referred to PIC by psychiatrists, psychologists, neurologists, social welfare organizations, school officials, child protective agencies, law school clinics, and other social service agencies. There is no other organization in the

nation that provides services to parents of children with disabilities similar to those offered by PIC.

16. PIC has handled approximately 500 due process hearings on behalf of parents with children with disabilities. Although the bulk of these hearings have been conducted in New Jersey and New York, a handful have been held in Pennsylvania and Delaware.

17. No state, apart from Delaware, has ever charged respondents -- or anyone affiliated with PIC -- with violating proscriptions against the unauthorized practice of law.

Due Process Hearings In Delaware in Which Respondents Have Provided Assistance

18. The Petition alleges that Ms. Arons provided legal advocacy to parents involved in no fewer than four due process hearings conducted by the Delaware Department of Public Instruction; namely, those involving the children identified as Nicholas DeCrease, Kevin Coale, Matthew Hayes, and Shawn White. The Petition further alleges that Ms. Watson provided legal advocacy services in at least one due process hearing, which involved a child identified as Philip Russ, conducted by the Delaware Department of Public Instruction.

19. Respondents did, in fact, accompany and advise the parents of each of the children identified in paragraph 18 in the due process hearings and, on behalf of those parents, made statements, examined and cross-examined witnesses, raised objections, proffered records and exhibits, and submitted briefs and other documents to the panel.

20. None of the parents of the children identified in paragraph 18 can afford the services of a private attorney.

21. The parents of the children identified in paragraph 18 diligently looked to find legal counsel to represent them in the due process hearing. None could find an attorney willing to represent them on a standard fee-for-service basis, and none could find an attorney willing to represent them on some reduced-cost or *pro bono* basis.

22. No legal services or other organization that provides free or low-cost legal services to people of low or modest means provides assistance in due process hearings in Delaware.

23. There is no source of funding, through fee-shifting statutes or otherwise, for lawyers to assist parents in due process hearings in Delaware.

24. Although there are child protection and advocacy services in Delaware, no organization providing such services gives assistance to parents in special education cases or due process hearings.

25. The economic reality is that parents of children with disabilities who are affluent or reasonably well-off financially enroll their children at private schools and thus do not depend on public school authorities to provide their children with an appropriate education. It is only parents who are unable to afford private education for their disabled children who are likely to end up in due process hearings in Delaware.

26. The parents of the children identified in paragraph 18 would not have exercised their right to a due process hearings under federal and Delaware law but for the availability and assistance of respondents.

27. None of the parents of the children identified in

paragraph 18 would have participated in a due process hearing without respondents' assistance because they were intimidated by the formality and complexity of the due process hearing. With the exception of Mr. and Ms. Hayes, none of the parents are college graduates, none had legal training of any sort, none were familiar with the procedures used in due process hearings conducted by the Department of Public Instruction or in legal proceedings generally, and none had the grounding in the technical issues that lay at the core of their disputes with the local schools boards to enable them to handle the hearings *pro se*.

28. None of the parents of the children identified in paragraph 18 would have participated in a due process hearing without respondents' assistance because they were also intimidated by the fact that the hearing was convened by the Department of Public Instruction (which is also an adverse party to the proceeding) and placed them in an adversarial posture against two instrumentalities of government, each represented by lawyers.

29. The parents of the children identified in paragraph 18 understood that respondents are not lawyers, do not hold themselves out as lawyers, and are not members of the Delaware bar or any other bar. Respondents disclosed those facts to them at the outset.

30. The parents of the children identified in paragraph 18 each sought out the services of respondents.

31. None of the parents of the children identified in paragraph 18 were charged a fee of any sort by respondents. Although the PIC generally requires all of the parents to whom it provides assistance to become a member of PIC, the parents of the children identified in paragraph 18 are of modest means.

Respondents have never sought payment to represent parents in due process hearings and did not seek payment from the parents of the children identified in paragraph 18. Respondents did not receive a penny from the parents of Kevin Coale or Matthew Hayes, and received only nominal amounts from the parents of Nicholas DeCrease and Phillip Russ to defray travel and other expenses. Nicholas DeCrease's parents paid $1,000 for expenses, which did not begin to cover the actual cost to PIC, which included extensive travel and other costs. Phillip Russ' parents contributed $300, which also did not cover PIC's actual, out-of-pocket expenses. These payments were made voluntarily by the parents, and not as a condition for the work respondents performed on their behalf.

32. The parents of the children identified in paragraph 18 are extraordinarily grateful for the services rendered to them and their families by respondents and believe that their position was effectively presented in the due process hearings.

33. In fact, the results respondents achieved for the children identified in paragraph 18 confirm the effectiveness of the presentation made on their behalf. In each case, the parents and child won significant relief, either at the due process hearing itself, or on judicial review, which is based on the record created at the due process hearing.

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Dated: August 4, 1998

BOARD ON THE UNAUTHORIZED PRACTICE OF LAW
OF THE SUPREME COURT OF THE STATE OF
DELAWARE

In the Matter of:
MARILYN ARONS, RUTH WATSON, and PARENT
INFORMATION CENTER OF NEW JERSEY, INC.
Respondents.

CONFIDENTIAL

No. UPL-4,1996

(UPL File Nos. 94-12; 95-17) OF

AMENDMENTS TO STIPULATION

The Office of Disciplinary Counsel ("Petitioner") and Marilyn Arons, Ruth Watson, and the Parent Information Center of New Jersey, Inc. ("Respondents"), through their undersigned counsel, hereby stipulate and agree to the following amendments to the Stipulation entered into by the Petitioner and the Respondents and filed with the Board on the Unauthorized Practice of Law on August 6, 1998. Where the language of the Stipulation as been altered, any new or additional language is underlined; deleted language is in brackets.

1. The first sentence of paragraph 11 of the Stipulation is amended to read as follows: "*In cases involving private placements, like the cases that gave rise to this proceeding*, the parties consist of parents, who, as explained more fully below, are often not represented by attorneys; the local school board, which is always represented by counsel; and

the Department of Public Instruction because the State ultimately bears a portion of the cost of providing a disabled child an appropriate education tailored to suit the child's unique needs."

2. The last sentence of paragraph 11 of the Stipulation is amended to read as follows: "Thus, due process hearings *concerning private placements* [always] involve two instrumentalities of government represented by counsel, arrayed against the parents."

3. The last sentence of paragraph 14 of the Stipulation is amended to read as follows: "*Ms. Arons and Ms. Watson are nonlawyers with 'special knowledge and training with respect to the problems of children with disabilities.*'" [Thus, nonlawyers with 'special knowledge and training with respect to the problems of children with disabilities,' like Ms. Arons and Ms. Watson, are fully capable of presenting the parents' case to the panel. 20 U.S.C. § 1415(d).].

4. Paragraph 22 of the Stipulation is amended to read as follows: "*Insofar as the parties are aware, the only legal services organization that has provided legal representation by counsel at Delaware IDEA due process hearings is Delaware's Community Legal Aid Society, Inc., which has, on occasion, provided representation at IDEA due process hearings to parents and children whose cases satisfy the organization's case acceptance criteria.*" [No legal services or other organization that provides free or low-cost legal services to people of low or modest means provides assistance in due process hearings in Delaware.].

5. Paragraph 23 of the Stipulation is deleted in its entirety. [There is no source of funding, through fee-shifting statutes or otherwise, for lawyers to assist parents in due

process hearings in Delaware.].

6. Paragraph 33 is amended to read as follows: "*The parents and children identified in paragraph 18 obtained some form of relief, at the due process hearing itself, on judicial review (which is based upon the record created at the due process hearing), or through negotiation or settlement.*" [In fact, the results respondents achieved for the children identified in paragraph 18 confirm the effectiveness of the presentation made on their behalf. In each case, the parents and child won significant relief, either at the due process hearing itself, or on judicial review, which is based on the record created at the due process hearing.].

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No. 00-509

In The

Supreme Court of the United States

MARILYN ARONS, RUTH WATSON, AND PARENT INFORMATION CENTER OF NEW JERSEY, INC.,

Petitioners,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF DELAWARE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Delaware

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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39pp

QUESTION PRESENTED

Does the Individuals with Disabilities Education Act ("IDEA") clearly manifest a Congressional purpose to supersede the states' historic authority and compelling interest in regulating the practice of law, and require states to permit non-lawyer representation of parties in IDEA due process hearings?

PARTIES TO THIS PROCEEDING

The petitioners in this case are Marilyn Arons, Ruth Watson, and the Parent Information Center of New Jersey, Inc., a non-profit organization with which Ms. Arons and Ms. Watson are affiliated. The respondent is the Office of Disciplinary Counsel of the Supreme Court of the State of Delaware, which is the arm of that court responsible for investigating and prosecuting matters involving the unauthorized practice of law in Delaware. The United States filed a brief *amicus curiae* in the Supreme Court of Delaware in support of Ms. Arons, Ms. Watson, and the Parent Information Center of New Jersey, Inc. The United States is not a party to this proceeding.

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STATEMENT OF THE CASE

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, is intended to "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. § 1415(a). Under the IDEA, the parents of a disabled child are entitled to challenge any proposal to change or initiate, or refusal to change or initiate, the identification, evaluation, educational placement or any other aspect of the provision of a free appropriate public education service to that child. *See id.* § 1415(b)(3). When complaints are received, "the parents involved in such complaint shall have the opportunity for an impartial due process hearing." *Id.* § 1415(f)(1). The IDEA also provides that, at this hearing, any party "shall be accorded . . . the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. § 1415(h)(1).

On August 8, 1996, the Office of Disciplinary Counsel ("ODC"), an arm of the Supreme Court of Delaware, filed a petition with the Board on the Unauthorized Practice of Law of the Supreme Court of Delaware (the "Board"), requesting the Board to find that Marilyn Arons, Ruth Watson, and the Parent Information Center of New Jersey, Inc. (hereinafter "petitioners") had engaged in the unauthorized practice of law in Delaware. Petitioners Arons and Watson are non-lawyers with "special knowledge and training with respect to the problems of children with disabilities." Pet. App. A55 (¶ 3). In connection with IDEA due process hearings conducted before the

Delaware Department of Public Instruction ("DPI"), they advised, counseled, and represented at least five Delaware families. Pet. App. A49 (¶¶ 18-19).

The legal issues before the Board were (1) whether the IDEA provides for representation by non-attorneys in Delaware due process hearings convened pursuant to that statute, and if so, whether the IDEA preempts any contrary state statute, regulation or rule; and (2) whether legal, as well as public policy, considerations mandate the conclusion that the petitioners' activities in connection with due process hearings constitute the unauthorized practice of law in Delaware.

The ODC stipulated to certain matters relating to the facts of the underlying cases. The stipulation was filed with the Board on August 6, 1998. Pet. App. A43. Prior to the hearing before the Board on June 23, 1999, the parties agreed to and submitted certain amendments to the stipulation. Pet. App. A54.

On September 24, 1999, the Board issued a written opinion concluding that the petitioners had engaged in the unauthorized practice of law. *In re Arons*, No. UPL-4, 1996 (Del. Bd. on the Unauthorized Practice of Law, Sept. 24, 1999) (Pet. App. A16), *aff'd*, 756 A.2d 867 (Del. 2000). Following the entry of an appeal by the petitioners to the Supreme Court of Delaware, the United States sought leave to appear in that court as an *amicus curiae*, which was granted. The United States Department of Justice filed a brief in support of the petitioners. After briefing was complete, the court heard oral argument.

On July 6, 2000, in an *en banc* opinion, the Supreme Court of Delaware announced its decision that the petitioners had engaged in the unauthorized practice of law. *In re Arons*, 756 A.2d 867 (Del. 2000) (Pet. App. A1). The court held that the IDEA does not authorize non-lawyer representation of parties at IDEA due process hearings. Although the court concluded that the disputed language in 20 U.S.C. § 1415(h) was ambiguous, it found persuasive evidence in the text of the statute, its history in Congress, and relevant case law interpreting the IDEA that supported the ODC's interpretation of the statute. The court also observed that Congress has explicitly included language in other federal statutes to permit lay representation where such a result was intended. Finally, the court considered and rejected an interpretation of the IDEA contained in a 1981 Department of Education letter to the State of Washington, the so-called "Sky Letter."[1] In so doing, the court accorded "modest" deference to the Department of Education's interpretation of the IDEA, which was informal and which was not based upon an express Congressional delegation of authority to elucidate the specific IDEA provision. Moreover, the court pointed out that, even if greater deference were required, "it is doubtful whether that interpretation could withstand the sheer weight of the legal and factual support for the opposite conclusion." Pet. App. A11.

In addition, the court rejected the petitioners' contention that adoption of their interpretation of the IDEA was

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[1] Letter of Theodore Sky, Acting General Counsel, Department of Education, to the Honorable Frank B. Brouillet, State of Washington (Apr. 8, 1981).

necessary in order to avoid "constitutional entanglements" with the Due Process Clause of the United States Constitution. Pet. App. A12. The court concluded that procedural due process would not be violated by forbidding parents from having non-lawyer representation in hearings under IDEA, noting that, among other things, parties to an IDEA hearing are already provided with substantial procedural safeguards. The court also gave significant weight to the strong governmental interest on the part of the State of Delaware in regulating the practice of law within its borders.

REASONS FOR DENYING THE WRIT

Review by this Court is not warranted. "This is a case about federalism," *Coleman v. Thompson*, 501 U.S. 722, 726 (1991), that is, about respect for "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999).

This Court has long recognized that "the States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia St. Bar*, 421 U.S. 773, 792 (1975).[2] It is

[2] The Supreme Court of Delaware has inherent jurisdiction over the governance of the practice of law in Delaware. *In re Member of the Bar*, 257 A.2d 382, 383 (Del. 1969), *appeal dismissed*, 396 U.S. 274 (1970); *Delaware Optometric Corp. v. Sherwood*, 128

also well-established that the states' historic police powers cannot be superseded by federal statute unless that was the "clear and manifest purpose" of Congress in enacting the statute. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 679 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The statutory interpretations and other legal and public policy arguments proffered by the petitioners (and by the United States in the Sky Letter and as *amicus curiae* in the proceedings below) must be critically evaluated against this backdrop of traditional state authority to regulate the practice of law. Respondent ODC respectfully requests that this Court find the petitioners' arguments for review to be unavailing in light of this compelling state interest.

A. The IDEA Does Not Authorize "Individuals With Special Knowledge And Training With Respect To The Problems of Children With Disabilities" To Represent Parties In Due Process Hearings.

1. Persuasive Third Circuit Case Law Supports The Supreme Court of Delaware's Interpretation Of The IDEA.

In *Arons v. New Jersey State Board of Education*, 842 F.2d 58 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988), the Third

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A.2d 812, 816-17 (Del. 1957). The court's jurisdiction includes the authority to regulate and proscribe the unauthorized practice of law. *Delaware St. Bar Ass'n v. Alexander*, 386 A.2d 652 (Del.), *cert. denied*, 439 U.S. 808 (1978).

Circuit was called upon to decide whether New Jersey, which had specifically granted "individual[s] with special knowledge or training with respect to the problems of children with disabilities" the authority to represent parents and children with disabilities in IDEA due process proceedings, could enforce a New Jersey rule prohibiting such persons from collecting attorneys' fees. *Id.* at 59-61. Petitioner Marilyn Arons contended that because the IDEA *itself* (and not merely New Jersey law) "confers on parents the right to be represented by a lay advocate," Congress must have intended for lay advocates to charge fees in order to encourage the continued use of such services. *Id.* at 61. The Third Circuit regarded this contention as the "[e]ssen[ce]" of Ms. Arons' argument on appeal, and squarely confronted and rejected it. *Id.*

In refuting Ms. Arons' argument, the Third Circuit concluded that "[t]he carefully drawn statutory language does not authorize these specially qualified individuals to render legal services." *Id.* at 62. The court explained its holding as follows:

> Although the Act does give "[a]ny party to any hearing" the right to "present evidence and confront, cross-examine, and compel the attendance of witnesses," those functions are not designated to be performed by lay advocates. Furthermore, the statute does not use the word "represent" in subsection [(h)(1)], as would be expected if Congress intended to place expert and legal counsel on the same footing.

Id. at 61. The court also pointed out that "[t]he highly specific language of the [IDEA] has led the Supreme

Court to read the statutory provisions narrowly." *Id.* at 62-63 (citing *Smith v. Robinson*, 468 U.S. 992, 1014 (1984)).

The Third Circuit's analysis of the IDEA was further informed by its recognition that "the States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Id.* at 63 (quoting *Goldfarb v. Virginia St. Bar*, 421 U.S. 773, 792 (1975)). The court noted that "[i]n the absence of explicit provisions, we are not convinced that Congress intended to limit the states' traditional control over the practice of law." *Id.* at 63. Because "[n]othing in the statutory language demonstrates a congressional desire to supersede the states' authority to regulate the legal profession," the court concluded that the IDEA does not authorize "individuals with special knowledge" to perform traditional representative functions. *Id.* at 61-62. The non-lawyer adviser may undertake representative functions only if permitted to do so under state law. *Id.* at 62.

The Supreme Court of Delaware found the Third Circuit's analysis of the "federalism issue" in *Arons* to be persuasive. Pet. App. A7. The court also agreed that the Senate Report on the Education for All Handicapped Children Act of 1975 (the forerunner to the IDEA), which described the non-lawyer's role as one of "consultation," provides compelling evidence that Congress did not intend non-lawyers to advocate on behalf of parents in

due process hearings.[3] *See Arons*, 842 F.2d at 62 (noting that Congress distinguished between the duties attributable to "counsel" and "individuals with special knowledge," insofar as the latter's role was to be "one of *consultation*, with emphasis on the responsibility to identify *educational* problems, evaluate them, and determine proper educational placement") (citing S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1470-71) (emphasis added).[4]

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[3] The Supreme Court of Delaware concluded that the language of 20 U.S.C. § 1415(h)(1) "is ambiguous to the extent it appears to confer joint authority on lawyers and nonlawyers to accompany and advise parents and others affected by the operation of the due process hearings provided under the IDEA." Pet. App. A6. Therefore, the court looked to legislative history to clarify the meaning of the statutory language.

[4] The petitioners cite three of this Court's cases in support of their assertion that this Court has "repeatedly cautioned against the use of committee reports in interpreting statutory language." Pet., at 18-19. No such generalized disparagement of Congressional reports is to be found in those decisions. In each case, there were special circumstances that made the report in question far less reliable than the reports cited by the Supreme Court of Delaware in the case at bar. *See National Fed'n of Federal Employees v. Department of Interior*, 526 U.S. 86, 96 (1999) (report concerned a bill that was not enacted into law); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 483-84 (1997) (footnote in report, where disputed statutory provision was reenacted without change, was unpersuasive evidence that there had been a change in the settled interpretation of the provision); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 609-10 (1991) (two principal committees responsible for the bill were in disagreement over whether it preempted pesticide regulation by political subdivisions).

The petitioners contend that the IDEA "draws no distinction between [lawyers and specialized lay advocates], treating [them] exactly the same." Pet., at 12. However, the petitioners wrongly assume that the IDEA contemplates that "counsel" and "individuals with special knowledge" will necessarily perform identical functions at IDEA due process hearings. In reality, although both categories of persons may "accompan[y] and advise [ ]" parties to such hearings, this language does not require that the subject matter and content of the contemplated "advice" be identical. *See Arons*, 842 F.2d at 62 (discussing the above-quoted language from the 1975 Senate Report).

Moreover, counsel have inherent and presumptive representational authority, while expert educational consultants do not. There is a well-established presumption that Congress is understood to legislate against a background of common-law principles, of which the "rule that a non-lawyer may not represent another person in court is a venerable [one]." *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231-32 (3d Cir. 1998).[5] *See United States v.*

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[5] In *Collinsgru*, the Third Circuit held that non-lawyer parents of children with disabilities do not have the right under the IDEA to represent their children in the federal courts. In so holding, the court emphasized that, in the absence of strong evidence of Congressional intent to the contrary, the IDEA is to be interpreted in a way that preserves the venerable common-law rule that a non-lawyer may not represent another person in court. The court also based its decision on the following public policy considerations: (1) the "strong state interest in regulating the practice of law"; and (2) the importance of the rights at issue, including the risk that those rights could be prejudiced by a lay representative not qualified in the law or accountable for ethical violations. 161 F.3d at 231.

Texas, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."). The IDEA grants the right to engage in the activities described by 20 U.S.C. § 1415(h)(2) (i.e., presenting evidence, cross-examining witnesses, and compelling the attendance of witnesses) to the *parties*. The IDEA is *silent* as to whether these functions may be performed by a non-lawyer who is not a party to the action. A silent statute can hardly be said to "speak directly" to the question of whether the IDEA supersedes the states' common-law rules on the practice of law by non-lawyers. *See Collinsgru*, 161 F.3d at 231-32.

Finally, as the Supreme Court of Delaware noted in its decision, recent amendments to the IDEA further support an interpretation that the IDEA does not authorize lay representation at due process hearings. Pursuant to these amendments in 1997, one of the safeguards required for agencies receiving federal funds under the IDEA is the adoption of procedures by the agency "that require the parent of a child with a disability, *or the attorney representing the child*, to provide notice" to the state or local educational agency of certain information in connection with a complaint. 20 U.S.C. § 1415(b)(6)-(7) (emphasis added). The word "attorney" is an indisputable reference to a member of the Bar and not a layperson, even if that layperson possesses "special knowledge or training with respect to the problems of children with disabilities." Pet. App. A8-9. In addition, it is relevant to note that Congress, in passing the Handicapped Children's Protection Act of 1986, which created a statutory right to reasonable attorneys' fees and related costs for a

prevailing party at an IDEA due process hearing, did not include any provision granting such fees for lay advocates. *See* 20 U.S.C. § 1415(i)(3)(B); *Arons*, 842 F.2d at 61-62.

2. The Department Of Education's Expansive Interpretation Of 20 U.S.C. § 1415(h) Is Not Entitled To Great Deference From This Court.

Citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the petitioners contend that the Supreme Court of Delaware erred by failing to accord great deference to the views expressed by the United States Department of Education, which advocates an expansive interpretation of 20 U.S.C. § 1415(h), mandating that every state receiving federal IDEA funds permit non-lawyers to represent parents at IDEA due process hearings. The Department's views on this issue were laid out in an informal 1981 policy letter ("the Sky Letter"), and in the United States' brief as *amicus curiae* in the proceeding before the Supreme Court of Delaware.[6]

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[6] The Sky Letter was written by the then acting General Counsel for the Department of Education, Theodore Sky, in response to a request by the Superintendent of Public Instruction for the State of Washington for a "legal analysis regarding the role of lay advocates in educational agency administrative hearings" under the IDEA. The superintendent had suggested that the IDEA's language indicates that non-lawyers are not in fact authorized to engage in activities conventionally viewed as legal representation, such as examining and cross-examining witnesses. *See* Pet. App. A9-10.

This Court has articulated certain conditions to the exercise of deference to administrative interpretations of federal statutes. Where Congress has not expressly delegated "authority to an agency to elucidate a specific provision of the statute by regulation," deference is due only to a "reasonable" administrative interpretation. Pet. App. A11 (quoting *Chevron*, 467 U.S. at 843-44). Further, less deference is due to informal agency interpretations of federal statutes, such as those expressed in the Sky Letter and the United States' *amicus curiae* brief, than to formal agency regulations adopted after a notice and comment period. *See* Pet. App. A11 (citing *Cleary v. Waldman*, 167 F.3d 801, 807-08 (3d Cir.), *cert. denied*, 120 S. Ct. 170 (1999)). *See also Christensen v. Harris Cty.*, 120 S. Ct. 1655, 1662-63 (2000) (stating that agency interpretations contained in formats such as opinion letters are "entitled to respect," but only to the extent that those interpretations have the "power to persuade") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). *See also* 20 U.S.C. § 1406(c) (1997 amendment to the IDEA, providing that "[t]he Secretary [of Education] may not, through policy letters or other statements, establish a rule that is required for compliance with, and eligibility under, this part without following the requirements" of the Administrative Procedures Act).

Moreover, considered in the context of the traditional state authority to regulate the practice of law, the text and the history of the IDEA reflect that the right to be represented at a due process hearing by a non-lawyer is a "gap" in the statute that has been left by Congress to be filled *by the states*, and not by the Department of Education. *Cf. Chevron*, 467 U.S. at 844-45 (where an agency has

reached a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," courts should not disturb it "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned"). *See also* 20 U.S.C. § 1417(b) (1997 amendment to the IDEA, providing that "[i]n carrying out the provisions of [the IDEA], the Secretary [of Education] shall issue regulations . . . only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this chapter").

The Supreme Court of Delaware was correct in concluding that the Department of Education's views on the interpretation of 20 U.S.C. § 1415(h) were entitled only to "modest deference." Pet. App. A11. Although the Department of Education does have day-to-day responsibility for the IDEA's implementation and enforcement, *see* Pet., at 16, that does not mean that Congress has given the Department's IDEA administrators *carte blanche* to override traditional state regulatory powers, such as the power to regulate the practice of law.

Furthermore, the Supreme Court of Delaware observed that even if it were required to give greater deference to the Department of Education's interpretation of 20 U.S.C. § 1415(h), "it is doubtful whether that interpretation could withstand the sheer weight of the legal and factual support for the opposite conclusion." Pet. App. A11. First, in concluding that the permissible roles of "counsel" and "individuals with special knowledge or training with respect to the problems of children with

disabilities" must be the same, the Department of Education has overlooked the inherent and presumptive representational authority with which counsel are cloaked and non-lawyers are not. Second, the Department has relied heavily on selectively chosen statements made by two Congressional lawmakers in 1975, while placing no weight on the 1975 Senate Report[7] or other aspects of the legislative history that are inconsistent with the Department's reading of the statute.[8] *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) ("Contemporaneous remarks of a single legislator who

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[7] To this day, the Department has failed to acknowledge the significance of the 1975 Senate Report's description of the role of the "individual[ ] with special knowledge" as being "one of *consultation*, with emphasis on the responsibility to identify *educational* problems, evaluate them, and determine proper educational placement." S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1470-71) (emphasis added).

[8] The Senate Conference Report on the Education for All Handicapped Children Act of 1975 (the forerunner to the IDEA), which explained the provisions of the reconciled bill containing the "accompanied and advised" provision now codified in 20 U.S.C. § 1415(h)(1) of the IDEA, states that in administrative due process hearings a party shall be "accorded (1) the *right to counsel* and to be *advised and accompanied by individuals with special knowledge, training or skills* with respect to the problems of handicapped children. . . . " S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1503 (emphasis added). This language from the Senate Conference Report, the document from the legislative history which best reflects the considered views of the members of *both* houses of Congress, draws an unambiguous distinction between (1) "counsel" (i.e., persons who are members of the Bar) and (2) specially qualified consultants.

sponsors a bill are not controlling in analyzing legislative history.").

Finally, the Department of Education's emphasis on the fact that lay representation had been authorized by Congress for certain other types of administrative hearings is "puzzling," because "that factor actually supports the opposite conclusion – that Congress knew how to authorize lay representation when it wished to do so." Pet. App. A11-12. The absence of similar language in the IDEA speaks strongly in establishing that Congress chose not to authorize lay representation. *See* Pet. App. A9 (citing 7 U.S.C. § 2020(e)(7), which is the Food Stamp Act provision allowing households in the certification process to "be represented by a person other than a member of the household so long as that person has been clearly designated as the representative . . . and . . . is an adult").[9]

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[9] The contrast between specific language in the Social Security Act provision on "representation" and 20 U.S.C. § 1415(h) of the IDEA is also quite instructive. For example, 42 U.S.C. § 406(a)(1) states, in part:

> The Commissioner of Social Security may prescribe rules and regulations governing *the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants* before the Commissioner on Social Security.

(Emphasis added). Pursuant to this explicitly and statutorily delegated authority, the Commissioner has adopted specific and detailed regulations governing the conduct of lay "representatives" in Social Security proceedings. *See* 20 C.F.R. §§ 404.1700-1799.

The petitioners attempt to bolster the Department's construction of 20 U.S.C. § 1415(h) by claiming that it is "consistent with the case law on this issue." Pet., at 13 n.3. They cite only *Z.A. v. San Bruno Park School District*, 165 F.3d 1273, 1276 (9th Cir. 1999) (lawyer admitted to bar other than California "could appear as a lay advocate" at an IDEA hearing in California, but could not collect attorneys' fees because of restrictions under state law) and *Woods v. New Jersey Department of Education*, 858 F. Supp. 51, 55 (D.N.J. 1993) (attorney-client privilege attaches to communications between lay advocate and parent during an IDEA hearing). In each of these cases, state law was understood by the federal court as having created a right to non-lawyer representation at IDEA due process hearings. Moreover, unlike the Third Circuit's ruling in *Arons*, the opinions of the courts in these cases contain no substantial analysis of the statutory language and history of 20 U.S.C. § 1415(h).

Finally, in support of its view that the IDEA preempts state authority to prohibit non-lawyer representation at due process hearings, the Department of Education has heavily relied upon this Court's decision in *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963). In *Sperry*, the Florida Bar challenged the right of a layperson to represent clients before the United States Patent Office. This Court rejected the challenge on the ground that Congress had empowered the Commissioner of Patents to prescribe regulations governing the practice by "agents, attorneys, or other persons representing applicants or other parties before the Patent Office." *Id.* at 384. Pursuant to that express statutory authorization, the Commissioner had established two separate registers of persons entitled to

represent applicants seeking patents. One register consisted of names of attorneys; the other listed non-lawyer "agents." *Id.* In *Sperry*, this Court called attention to the long history of practice by non-lawyer agents before the Patent Office and noted the extended Congressional debate over the matter. *Id.* at 388.

Sperry is readily distinguishable from the case at bar. First, unlike the Patent Office (the agency at issue in *Sperry*), DPI is a state, not a federal, agency. Second, there is no time-honored tradition of practice by non-lawyers before DPI, nor did Congress engage in any kind of extensive debate about the activities of lay advisors when it adopted the relevant IDEA provision. Third, the statute at issue in *Sperry* specifically referred to persons "*representing* applicants." *Id.* at 384 n.3 (emphasis added). Here, in contrast, the IDEA states only that a party "may be *accompanied and advised* by counsel and by individuals with special knowledge or training." 20 U.S.C. § 1415(h)(1) (emphasis added). *See Arons*, 842 F.2d at 61-62 (distinguishing *Sperry*).

Neither the language and history of the IDEA reflect that Congress intended to require the states to permit "individuals with special knowledge and training with respect to the problems of children with disabilities" to perform traditional representative functions at IDEA due process hearings. Both the petitioners and the Department of Education disregard the historic and compelling state interest in regulating the practice of law, which has properly informed the construction of 20 U.S.C. § 1415(h) by the Third Circuit and by the Supreme Court of Delaware. Because this construction of the IDEA was correct, review by this Court is not warranted.

B. The IDEA Does Not Preempt The Traditional State Authority To Regulate The Unauthorized Practice Of Law.

The petitioners argue that to the extent Delaware law proscribes their practice of law in due process hearings as unauthorized, principles of federal preemption arising under the Supremacy Clause of the United States Constitution override Delaware's regulatory authority. The Supreme Court of Delaware properly determined that the petitioners' claim of federal preemption was mooted by the court's conclusion that 20 U.S.C. § 1415(h)(1) creates no "clear right to lay representation." Pet. App. A15.

"Preemption fundamentally is a question of congressional intent." *English v. General Elec. Co.*, 496 U.S. 72, 78 (1990). *See also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (noting that " '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case") (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Such intent can either be expressed in the language of the statute itself, or implied. However, "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

Congress did not expressly preempt state regulation of the practice of law in the context of IDEA due process hearings. Nor do the IDEA or its history reflect that

Congress intended to occupy the entire field with respect to the procedures or the substantive requirements for the provision of educational and related services to children with disabilities. Rather, Congress intended to establish a system of "cooperative federalism" through the IDEA. *See Town of Burlington v. Department of Educ.*, 736 F.2d 773, 785 (1st Cir. 1984), *aff'd sub nom. School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985). "[T]he rule is that the IDEA preempts state law only if the state standards are below the federal minimum." *Converse Cty. Sch. Dist. No. Two v. Pratt*, 993 F. Supp. 848, 854-55 (D. Wyo. 1997) (citing *Evans v. Evans*, 818 F. Supp. 1215, 1223-24 (N.D. Ind. 1993)).

The petitioners have argued that the Supreme Court of Delaware's prohibition against non-lawyer representation at IDEA due process hearings is barred under principles of "implied preemption." Pet., at 23. More precisely, the petitioners are asserting that there is an "implied" *actual conflict* between federal and state law, based upon what has come to be known as "obstacle" preemption. *See generally Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 606-07 (1991) (explaining the distinctions between express preemption, implied "field" preemption, and conflict preemption). As this Court has explained, where Congress "has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it *actually conflicts* with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* (emphasis added). In considering assertions of "conflict" preemption, this Court has emphasized that the

proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973). An emphasis on reconciling state and federal laws and objectives is particularly appropriate in any preemption analysis involving the IDEA, in light of the principles of "cooperative federalism" which the statute reflects.

The petitioners have failed to recognize the well-established presumption against preemption, which is rooted in the concept of federalism and is designed to avoid "unintended encroachment on the authority of the States." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993). Following this presumption, "a court interpreting a statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is the 'clear and manifest purpose of Congress.' " *Id.* at 664 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).[10] In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985).

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[10] *See also Medtronic*, 518 U.S. at 485 (observing that the presumption against preemption applies "[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied") (internal quotations omitted); *California v. ARC Am. Corp.*, 490 U.S. 93, 101-03 (1989) (relying upon the presumption against preemption, and finding no conflict preemption of state indirect purchaser statutes under the federal antitrust laws based upon an alleged frustration of Congressional purposes).

Absent such limitations, federal administrative agencies would be free to assert preemptive authority over state governments on issues that involve areas of traditional state authority, without the constraint of a clear Congressional mandate.

The Department of Education's view that Delaware's enforcement of its rules on the unauthorized practice of law will frustrate Congress' objectives in enacting 20 U.S.C. § 1415(h) fails to overcome the presumption against preemption, in light of the language and history of the IDEA. As the Supreme Court of Delaware correctly concluded (consistent with the Third Circuit's ruling in *Arons*), the IDEA simply does not create any "clear right to lay representation." (*See* discussion *supra*, section I). Therefore, the IDEA cannot and does not reflect any "clear and manifest purpose" on the part of Congress to supersede the traditional state authority to regulate the practice of law. *Cf. Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 606-15 (1991) (where the text and the legislative history of the federal statute were ambiguous, there was no preemption of local regulation in a subject area involving historic police powers). Moreover, this Court has observed that the doctrine of preemption does not undermine a state's authority to regulate "a distinctive part of a subject which is peculiarly adapted to local regulation," where Congress could have "but did not" regulate that part of the subject. *See Hines v. Davidowitz*, 312 U.S. 52, 68 n.22 (1941). The IDEA includes extensive procedural safeguards in 20 U.S.C. § 1415(h) for the protection of the interests of parties to due process hearings,

but Congress left it for the states – and *not* the Department of Education – to determine whether non-lawyers are permitted to represent parties at the hearings.

In support of their argument for "obstacle" preemption, the petitioners have cited this Court's recent decision in *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000). In *Geier*, this Court held that there is no "special burden" placed on a court's application of ordinary principles of conflict preemption when a federal statute contains an express preemption clause, and that, based upon an analysis of the federal agency standard in question, the injured motorist's state common-law tort action was barred by reason of "obstacle" preemption. *Id.* at 1920-21, 1927. This Court did not call into question the general applicability of the presumption against preemption, or the presumption's particular strength where the federal government has stepped into areas of traditional state authority. *See, e.g., Medtronic*, 518 U.S. at 485 (observing that a presumption against the preemption of state police power regulations is "consistent with both federalism concerns and the historic primacy of state regulation in matters of health and safety").

Furthermore, *Geier* is distinguishable from the case at bar. The Court addressed the preemptive effect of a "passive restraints" standard adopted by the United States Department of Transportation pursuant to its authority under the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 80 Stat. 718 (1966), 15 U.S.C. § 1381 *et seq.* (1988) (current version at 49 U.S.C. § 30101 *et seq.*). The Safety Act broadly delegated to the Department of Transportation the authority to establish motor vehicle safety standards that are "practicable," "meet the

need for motor vehicle safety," and are "stated in objective terms." *See* 15 U.S.C. § 1392(a) (1988) (current version at 49 U.S.C. § 30111(a)). In contrast, the IDEA includes a provision that restricts the ability of the Department of Education to expand upon, through the use of regulation, the "specific requirements" of the IDEA, including the specific requirements contained in 20 U.S.C. § 1415(h).[11] This statutory restriction that Congress has now placed on the Department of Education refutes any suggestion that Congress intends for the Department of Education to engage in expansive inquiries into the underlying "purposes" of 20 U.S.C. § 1415(h), or, based on its conclusions, to mandate additional procedural safeguards that are not found in the language of the statute.

The petitioners' arguments for deference to the Department of Education's views on "obstacle" preemption, based upon this Court's decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), *see* Pet., at 11, 24, are similarly unpersuasive. *Medtronic* involved the preemptive effect on state law of a provision contained in the Medical Devices Amendments of 1976 ("MDA"), 90 Stat. 539 (1976), 21 U.S.C. §§ 306c-360k, 379, 379a & 42 U.S.C.

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[11] *See* 20 U.S.C. § 1417(b) (1997 amendment to the IDEA, providing that "[i]n carrying out the provisions of [the IDEA] the Secretary [of Education] shall issue regulations under this chapter only to the extent that such regulations are *necessary to ensure that there is compliance with the specific requirements* of this chapter") (emphasis added). Prior to 1997, 20 U.S.C. § 1417(b) had provided that "[i]n carrying out the provisions of [the IDEA], the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations *as may be necessary*." (Emphasis added).

§ 3512 (1994), a statute which is administered by the Food and Drug Administration ("FDA") by delegation of authority from the Secretary of the Department of Health and Human Services ("HHS"). *See Medtronic*, 518 U.S. at 482 n.5, 496. The Court observed that Congress had explicitly delegated to the FDA the authority to exempt state regulations from the preemptive effect of the MDA – "an authority that necessarily requires the FDA to assess the pre-emptive effect that the [MDA] and its own regulations will have on state laws." *Id.* at 496 (citing 21 U.S.C. § 360k(b)).[12] The Court then concluded that "[t]he ambiguity in the statute, and the congressional grant of authority to the agency on the matter contained in it, provide a sound basis for giving substantial weight to the agency's view of the statute." *Id.* at 496 (internal quotations and citation omitted). In contrast, Congress' delegation of regulatory authority to the Department of Education is much less open-ended, consistent with the spirit of "cooperative federalism" that underlies the IDEA. *See* 20 U.S.C. § 1417(b) (both pre- and post-1997, discussed *supra*). Accordingly, *Medtronic* lends little support to the petitioners' argument for deference to the Department of Education's views on "obstacle" preemption.

Finally, it is worth noting that the Congressional mandate contained in the text of the IDEA is that the

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[12] *See also* 21 U.S.C. § 371(a) (broadly delegating to the Secretary of HHS the authority to promulgate regulations "for the efficient enforcement" of the Federal Food, Drug, and Cosmetic Act), *cited in Medtronic*, 518 U.S. at 496 n.15.

parents of children with disabilities must have an "opportunity for an impartial due process hearing." 20 U.S.C. § 1415(f)(1). The purposes and objectives of Congress expressed in the IDEA are not impeded by Delaware's prohibitions against the unauthorized practice of law. The more reasonable approach is to harmonize the state and federal schemes, so that the states are free to adopt their own rules and regulations concerning the practice of law by non-lawyers at IDEA due process hearings. *See, e.g., Connors v. Mills*, 34 F. Supp. 2d 795, 807 (N.D.N.Y. 1998) (explicit New York state regulation permitting lay representation at IDEA due process hearings); Pet. App. A33 n.6 (report of the Board, quoting the New York regulation).

The Supreme Court of Delaware's decision is consistent with well-established preemption principles, and does not require further review by this Court.

C. The Due Process Clause Of The United States Constitution Does Not Support The Petitioners' Interpretation Of The IDEA.

The petitioners claim that the Supreme Court of Delaware erred by rejecting their argument that a prohibition against non-lawyers representing parents at IDEA due process hearings creates substantial Due Process problems, which can be avoided by construing the statute as requiring states to permit non-lawyer representation. Pet., at 20-22.

In proceedings that may result in the government deciding to withhold a service under the IDEA, the Due Process Clause requires only that the government afford

the child with minimal procedural protections. *See Wenger v. Canastota Cent. Sch. Dist.*, 979 F. Supp. 147, 153 (N.D.N.Y. 1997) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)), *aff'd*, 181 F.3d 84 (2d Cir. 1999), *and aff'd*, 208 F.3d 204 (2d Cir. 2000), *petition for cert. filed*, U.S.L.W. (U.S. Sept. 25, 2000) (No. 00-6315). The complaint and hearing procedures outlined in the IDEA, and adhered to by the State of Delaware (*see* Pet. App. A3, A46-47, and A54-55), more than satisfy the requirements of the Due Process Clause.

Balancing the three factors identified by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court of Delaware observed that, while there is no question of the importance of the individual interests involved in IDEA due process hearings, parties to these hearings "are already provided with substantial procedural safeguards." Pet. App. A13. The court noted that the hearings are conducted in a manner typical of contested, adversarial proceedings, including the direct and cross-examination of witnesses and the required exchange of witness lists and documents in advance of the hearing. Furthermore, the court believed that Delaware's three member panel, consisting of an attorney, an educator in the area of special education, and a layperson with a demonstrated interest in the education of students with disabilities, "affords parents an unbiased hearing" and, coupled with the other procedural safeguards, "adequate structural protection." Pet. App. A14 n.4. The court also agreed with the ODC that the petitioners had "grossly and unfairly" exaggerated the risk that Delaware will deprive children of their individual liberty interests under the IDEA unless the children and their parents are

allowed to be represented by lay advocates. Pet. App. A13. Moreover, the court found that the record did not support the petitioners' assertion that parents and children would be denied access to "the only assistance available to them" if non-lawyer representation was not permitted. Pet. App. A14.

The Supreme Court of Delaware also properly considered the compelling state interest in regulating the practice of law as an important factor in the application of the *Mathews* balancing test. The court concluded that any potential benefit that some individual parents and children may obtain through the services of lay advocates was significantly outweighed by the court's compelling interest in ensuring that "the public will enjoy the representation of individuals who have been found to possess the necessary skills and training to represent others." Pet. App. A13-14.

This Court has recognized that "the states have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia St. Bar*, 421 U.S. 773, 792 (1975). *See Middlesex Cty. Ethics Comm. v. Garden St. Bar Ass'n*, 457 U.S. 423, 434 (1982) (noting that states have an "extremely important interest" in the regulation and licensing of attorneys); *Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the

District of Columbia within their respective jurisdictions.").[13] The Supreme Court of Delaware's decision to prohibit non-lawyer representation at IDEA due process hearings was fully consistent with its broad authority to regulate in this area of traditional state power.

The petitioners' reliance upon cases such as *Santosky v. Kramer*, 455 U.S. 745 (1982), *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), and *Little v. Streater*, 452 U.S. 1 (1981), only serves to highlight the weakness of their Due Process argument. In *Santosky*, the Court required a minimum evidentiary standard of "clear and convincing evidence" for the termination of parental rights. 455 U.S. at 769-70. *Lassiter* also involved the termination of parental rights, and the Court held that the failure of the state to appoint counsel for indigent parents did not violate the Due Process Clause under the circumstances of that case. 452 U.S. at 31-32. *Little* involved "the creation of a parent-child relationship" in paternity proceedings, and the Court held that Due Process prohibited the denial of blood grouping tests to an indigent defendant. 452 U.S. at 16. The petitioners have failed to identify any case in which this Court has held that the Due Process Clause requires a state, which has implemented formal, adversarial hearing procedures for resolving disputes about the provision of government benefits or services pursuant to a federal statute, to allow non-lawyers

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[13] *See also Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231 (3d Cir. 1998) (citing "the strong state interest in regulating the practice of law" as an important consideration in rejecting an alleged right of a parent to represent a child in IDEA proceedings in federal court).

to engage in traditional representative functions at such hearings.

The petitioners have fallen far short of demonstrating that the Supreme Court of Delaware's decision in *Arons* creates any "entanglement" with the requirements of Constitutional Due Process.

CONCLUSION

Review by this Court of the *en banc* decision of the Supreme Court of Delaware is not warranted. That court correctly construed the disputed language found in 20 U.S.C. § 1415(h), concluding that neither the text nor the history of the IDEA reflect that Congress intended to require the states to permit "individuals with special knowledge or training with respect to the problems of children with disabilities" to represent parties in IDEA due process hearings. Having found no "clear right to lay representation" in the IDEA, Pet. App. A15, the court properly determined that the petitioners' claim of federal preemption was moot. This Court's precedents do not support the petitioners' argument for "obstacle" preemption, particularly in an area of traditional state authority such as the regulation of the practice of law. Finally, the requirements of the Due Process Clause are more than satisfied by the procedural safeguards implemented by the State of Delaware pursuant to the IDEA. In furtherance of the state's compelling interest in regulating the practice of law, the Supreme Court of Delaware determined that the petitioners were not authorized to represent parents in IDEA due process hearings. This Court

should reject the petitioners' invitation to use the Due Process Clause as justification for expanding federal authority under the IDEA beyond the language of the statute.

For the foregoing reasons, the respondent ODC respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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Dated: November 2, 2000

Supreme Court, U.S.
FILED
NOV 17 2000
CLERK

(3)

No. 00-509

IN THE

Supreme Court of the United States

MARILYN ARONS, RUTH WATSON, AND PARENT INFORMATION CENTER OF NEW JERSEY, INC.,
Petitioners,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF DELAWARE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Delaware

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent Office of Disciplinary Counsel of the Supreme Court of the State of Delaware ("ODC") devotes virtually its entire opposition brief to defending the Supreme Court of Delaware's ruling that the Individuals with Disabilities Education Act ("IDEA") does not authorize non-lawyers to advocate on behalf of parents in IDEA hearings. But ODC never suggests that the issues presented in this case are not critically important to the tens of thousands of parents with disabled children who cannot find or afford lawyers to represent them when they have disputes with their school boards. Nor does ODC contest that the ruling below will deprive parents facing due process hearings of the only assistance that is available to them. And nowhere does ODC dispute that the ruling below squarely conflicts with the position of the United States Department of Education — the agency charged with IDEA's implementation — that IDEA authorizes non-lawyer representation. Stripped of its rhetoric, ODC's contention is that this case is not worthy of this Court's review because it and the Supreme Court of Delaware are correct about what IDEA means, and the United States Department of Education and petitioners are wrong. As we now explain, this Court should grant review because of the profound importance of this case to the administration of IDEA, and because the uncertainty engendered by the ruling below will impede the Act's uniform and effective implementation.

1. The Questions Presented Are Important.

This case involves the interpretation of a federal statute that governs the rights of over 8 million disabled children in the United States to an appropriate public education. *See Honig v. Doe*, 484 U.S. 305, 309 (1984). At the heart of the Act are its procedural "safeguards," and most fundamentally the right of parents to contest decisions by school boards that deny their

children an educational opportunity. Under the provision at issue, parties to IDEA due process hearings "shall be accorded," among other things, "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). Petitioners and the Department of Education contend that this language expressly authorizes non-lawyers, trained in the needs of disabled children, to advocate on behalf of disabled children and their parents in IDEA due process hearings. *See* Petition, at 11-16; Brief of the United States, *In re Arons,* No. 440, Del. Sup. Ct. (Dec. 1, 1999) at 18-21 (hereinafter "U.S. Amicus Br.").[1]

ODC makes a number of points in response, but the crux of its argument is that "although both categories of persons [lawyers and lay advocates] may 'accompan[y] and advise[]' parties to such hearings, this language does not require that the subject matter and content of the contemplated 'advice' be identical." Brief in Opposition at 9 (brackets in original, citation omitted). According to ODC, lawyers may represent parents, not because of section 1415(h)(1), but because "counsel have inherent and presumptive representational authority, while expert educational consultants do not," and hence lay experts like Petitioners are required to be no more than passive participants at due process hearings. *Id.* By this legerdemain, ODC essentially rewrites the Act to erase that part of section 1415(h)(1) that authorizes parents to have non-lawyer assistance at hearings.

ODC's argument, which was accepted in full by the Delaware Supreme Court (Pet. App. at A5-A7), is riddled with

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[1] For the convenience of the Court, copies of the United States' Amicus Brief have been lodged with the Clerk's office.

flaws. To begin with, section 1415(h) confers a number of rights on *parties,* including the right to present evidence, to call, confront, and cross-examine witnesses, to compel the attendance of witnesses, to have a written or verbatim record of the hearing, and to written findings of facts and decisions. Section 1415(h)(1) uses identical words to authorize lay experts and attorneys to act on behalf of parties at due process hearings. It neither distinguishes between the roles of attorneys and lay advocates, nor implies that their roles, authority, or responsibilities at due process hearings are any different. Moreover, accepting ODC's contention that attorneys have "inherent and presumptive representational authority" renders section 1415(h)(1)'s reference to "counsel," and much of the remainder of the provision, surplusage. And accepting ODC's argument would lead to the absurd conclusion that Congress authorized lay advocates to do no more than serve as ventriloquists at hearings, telling parents what questions to ask, what arguments to make, what exhibits to introduce, and otherwise orchestrating the parents' case. Nowhere does the ODC explain why Congress would have decreed such a bizarre result. In short, the idea that the Act contemplates separate roles for lawyers and lay advocates is the ODC's invention, unsupported by the text, structure, or history of section 1415(h).

The flaws in ODC's argument bring the need for this Court's review into sharp focus. The representational provision of IDEA lies at the very center of the Act's procedural guarantees, and its misreading by the Delaware Supreme Court jeopardizes the fulfillment of the Act's goal of empowering parents to challenge adverse school board decisions. Relying on the Department's longstanding construction of the Act, every state in the nation has, until now, permitted non-lawyer representation in IDEA proceedings. Lay representation has become the norm, as the undisputed facts of this case illustrate. The parents that Petitioners assisted had nowhere else to turn.

Although the parents "diligently looked for legal counsel," none "could find an attorney willing to represent them on a standard fee-for-service basis, and none could find an attorney willing to represent them on some reduced-cost or *pro bono* basis." Stipulation, ¶ 21 (Pet. App. A50). That is hardly surprising since IDEA cases are complicated, fact-intensive, time-consuming and pit parents against resource-rich opponents. *See id.* ¶¶10, 13, 14 (Pet. App. A46-A48). Thus, even though IDEA contains a fee-shifting statute, the obstacles to victory are sufficiently daunting to discourage lawyers from taking on these cases. And there is no dispute that the demand for legal assistance in IDEA cases far outstrips the availability of lawyers. Without non-lawyer assistance, the "right" to a hearing guaranteed by the Act becomes, for most parents, a right in name only. *See id.* ¶¶26-28 (Pet. App. A50-A51) (explaining why parents denied legal assistance would forego their right to a hearing).

Unless the decision below is set aside, IDEA's goal of giving parents the ability to participate fully in charting their child's educational destiny will be thwarted, and the rights of virtually every parent of a disabled child in the nation will be thrown into question. As the United States emphasized in its brief to the Supreme Court of Delaware, denying parents the right to non-lawyer assistance "frustrates" and "unquestionably subverts" the Act and therefore "cannot stand." U.S. Amicus Br. at 27.

2. The Failure of the Court Below to Defer to the Department of Education Jeopardizes the Uniform Enforcement of IDEA.

Until the ruling below, every court to address questions relating to the interpretation and implementation of IDEA has given considerable deference to the Department of Education's

views. As the Petition points out, this Court has always looked to the Department for guidance in cases challenging the adequacy of a state's, or local school board's, compliance with the Act. Petition at 16 (citations omitted). And almost invariably, those views are adopted by the courts. As a result, the Act is administered uniformly nationwide.

The Supreme Court of Delaware, however, has broken ranks and essentially disregarded the Department of Education's views. The Department made two arguments below: first, that the text, structure, and purpose of IDEA compelled the conclusion that the Act authorized non-lawyer representation; and second, that a contrary ruling would stand as an obstacle to the fulfillment of the overriding federal interest in empowering parents to challenge adverse school board decisions, and hence would be preempted.

As to the statutory construction issue, the court below gave, at most, lip service to the Department's interpretation. Although the court cited *Chevron, USA, Inc. v. NRDC,* 467 U.S. 837, 843-45 (1984), it nonetheless concluded that it owed at most "modest" deference to the Department's views, and then noted that even "less deference is due" because the agency's statements were "informal." Pet. App. at A10-A11. In fact, the court simply brushed aside the Department's views and substituted its own contrary judgment, even though the Department had articulated the basis for its construction of the Act in a detailed 1981 opinion letter, a thirty-five page amicus brief, and a series of administrative rulings. The Delaware court's approach cannot possibly be reconciled with this Court's rulings regarding deference.

As to the Department's preemption argument, the Supreme Court of Delaware made no pretense at all of considering the Department's position that barring lay

advocates from IDEA hearings would "substantially frustrate" and "unquestionably subvert" the accomplishment of an important federal objective. U.S. Amicus Br. at 26-27. This Court has repeatedly driven home the point that federal agencies are "uniquely qualified to determine whether a particular form of state law" frustrates federal objective. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996); *accord Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1926-27 (2000). Nonetheless, the Delaware Supreme Court entirely ignored the Department's preemption argument.

As a result, IDEA, a federal statute of undeniable importance to more than 8 million American families, will be interpreted in a piecemeal and widely varying manner depending solely on the state in which a disabled child resides. Although IDEA's implementation and enforcement is, at least in the first instance, carried out by the states, the federal government has ultimate supervisory responsibility under the Act. It has always served as a bulwark to ensure that parents do not get shortchanged by states and local school boards, which have strong financial incentives to deny costly services to disabled children. *See Cedar Rapids Community Sch. Dist. v. Garrett F.*, 119 S. Ct. 992, 999-1000 (1999); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 892 (1984). And, until now, the courts have respected the Department's role as principal arbiter of the Act's meaning.

The ruling below turns that understanding upside down, by rejecting as almost immaterial the Department's views on the meaning of one of IDEA's pivotal provisions and on the impact a ruling barring lay advocates will have on the accomplishment of the Act's objectives. The message sent to parents by the Supreme Court of Delaware is that the federal government is no longer the guarantor of the procedural rights of parents and children under IDEA; rather, their fate is in the

hands of state courts, which have less expertise in the interpretation and enforcement of federal laws, and little interest in the uniform administration of federal law. Because that message is wrong as a matter of law, this case merits review by this Court.

CONCLUSION

For the reasons stated above and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 2000

Supreme Court, U.S.
FILED
MAY 10 2001
OFFICE OF THE CLERK

No. 00-509

In the Supreme Court of the United States

MARILYN ARONS, ET AL., PETITIONERS

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF DELAWARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, which requires that States afford parties to administrative "due process" hearings "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities," 20 U.S.C. 1415(h)(1) (Supp. IV 1998), establishes a clear federal right to non-lawyer representation in those proceedings that preempts a contrary state rule against the unauthorized practice of law.

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OFFICE OF DISCIPLINARY COUNSEL
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, establishes a cooperative program under which the federal government makes grants to participating States to assist them in providing public education to children with disabilities. See generally 20 U.S.C. 1400(d) (Supp. V 1999) (statement of statutory purposes).[1] Delaware participates in

[1] Congress revised the IDEA extensively in 1997. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No.

the IDEA program, and must comply with the Act's requirements in the administration of the program within the State. See Pet. App. A2 n.1, A44.

Among other things, the IDEA requires Delaware to provide certain procedures "to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. 1415(a). Those procedures must include "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6). When such a complaint is made, "the parents involved * * * shall have an opportunity for an impartial due process hearing. " 20 U.S.C. 1415(f)(1). Moreover, at any such hearing each party, including the parents, must be accorded certain rights, including "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1).

2. Petitioners Arons and Watson are non-lawyers who have "special knowledge or training with respect to the problems of children with disabilities" within the meaning of Section 1415(h)(1). Pet. App. A55. Each of them has appeared with and on behalf of the parents of a disabled child in at least one IDEA "due process hearing" conducted by the Delaware Department of Public Instruction. *Id.* at A2-A3, A49.

105-17, Tit. I, § 101, 111 Stat. 37. Unless otherwise indicated, references in this brief are to the Act as set out in the 1999 Supplement to the United States Code.

Such hearings are held before a three-person panel, chaired by an attorney licensed to practice law in Delaware and including an "educator knowledgeable in the field of special education and special educational programming" and a "lay person with demonstrated interest in the education of the handicapped." Del. Code Ann. tit. 14, § 3137(d)(1)-(3) (1999); see Pet. App. A46. The parties are parents, the local school board, and the State Department of Public Instruction. The matters at issue "typically involve complex factual questions relating to the unique learning needs of the disabled child[,] * * * the adequacy and accuracy of the school board's testing, evaluation, and diagnosis of the child's problem, and the remedial measures needed to address the child's disability." *Id.* at A47. Fact witnesses typically include school officials such as teachers, counselors, and principals, and expert witnesses include neurologists, psychiatrists, psychologists, physicians, and others with special knowledge of educational and developmental matters. *Id.* at A47-A48.

At the hearings that gave rise to this litigation, the local school boards and the Delaware Department of Public Instruction were represented by legal counsel. Pet. App. A46. In each case, parents of a disabled child sought assistance from petitioners because they could not find a lawyer who was willing to handle their case for a fee they could afford to pay. *Id.* at A49-A51. Petitioners accompanied these parents to the IDEA hearings and, on their behalf, "made statements, examined and cross-examined witnesses, raised objections, proffered records and exhibits, and submitted briefs and other documents to the panel." *Id.* at A49. Without petitioners' assistance, none of the parents would

have invoked the right to an IDEA hearing. *Id.* at A50; see *id.* at A50-A51.

3. In August 1996, the Delaware Office of Disciplinary Counsel initiated a proceeding before the Board on the Unauthorized Practice of Law of the Supreme Court of Delaware (the Board), challenging petitioners' practice of representing parents at IDEA hearings. Pet. App. A16. After briefing and argument on stipulated facts, the Board concluded that such representation constituted the practice of law, and that it was unauthorized if performed by persons, like petitioners, who were not admitted to the Delaware bar. See *id.* at A23-A42.

The Board rejected petitioners' argument that their activities were not "unauthorized" under state law because the IDEA supplies federal authorization for qualified non-lawyers to represent parents at IDEA hearings. First, the Board noted the state Supreme Court's traditional jurisdiction over the practice of law within the State. Pet. App. A24-A27. Turning to the language of Section 1415(h)(1), the Board distinguished the Act's provision that parents may be "accompanied and advised" by "individuals with special knowledge or training" from provisions in other statutes that, in the Board's view, used terms such as "agent" or "representative" to express an "inten[tion] to allow *representation* of parties by nonlawyers in administrative or other proceedings." *Id.* at A27 (emphasis added). The Board concluded that the "plain language" of Section 1415(h)(1) does not authorize lay representation, because Congress "used words—'accompanied and advised'—which do not ordinarily convey the concept of representation." *Id.* at A28.

The Board found support for that conclusion in the Act's legislative history, noting a comment in the

Senate Conference Report that a party has a "right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with respect to the problems of handicapped children." Pet. App. A29 (quoting S. Conf. Rep. No. 455, 94th Cong., 1st Sess. (1975)). In the Board's view, that language "confirm[ed] the clear distinction between the representational role of counsel and the advisory role of nonlawyers." *Ibid.* The Board also drew support from the reasoning of the Third Circuit in *Arons* v. *New Jersey State Board of Education*, 842 F.2d 58, cert. denied, 488 U.S. 942 (1988), which upheld a scheme under which New Jersey permitted certain non-lawyers to represent parents at IDEA hearings, but prohibited non-lawyers from receiving fees for such representation. See Pet. App. A29-A31.

The Board refused to defer to the contrary position of the United States Department of Education, set out in a 1981 opinion letter. Pet. App. A31-A35; see App., *infra*, 1a-12a (reprinting opinion letter). The Board first reasoned that there was no room for deference because "[t]he usage of the phrase 'accompanied and advised' rather than the term 'represented' or words of similar import," in the context of Section 1415(h)(1), established unambiguously that "Congress did not intend to mandate a right to lay representation." Pet. App. A32-A33. In any event, the Board concluded that the position adopted by the Secretary of Education was not a "'reasonable' administrative interpretation," *id.* at A33, because the Secretary "overlooked the inherent and presumptive representational authority with which counsel are cloaked," and which "nonlawyers simply do not share," *id.* at A34; relied on different legislative history from that found persuasive by the Board, *id.* at A34-A35; and drew a conclusion different from that

drawn by the Board from the fact that Congress had authorized lay representation in various other administrative proceedings, *id.* at A35.

Finally, the Board rejected petitioners' related argument that the Delaware prohibition on lay representation was preempted by virtue of a conflict with federal law. Pet. App. A36-A41. The Board noted that "regulation of the practice of law is a traditional State function," and reasoned that it could "find preemption of this area * * * only if [it could] conclude that preemption was the 'manifest intent' of Congress." *Id.* at A38-A39; see also *id.* at A37. Based on its statutory analysis, the Board perceived no actual conflict between the Delaware rule and Section 1415(h)(1). *Id.* at A39. The Board did "recognize the force of [petitioners'] contention that representation of families of children with disabilities by laypersons * * * could serve the accomplishment of the full objectives of Congress under IDEA," particularly in light of a record showing that the families represented by petitioners "were unable to find attorneys who would agree to represent them on a standard fee-for-service basis, a low-cost basis or pro bono." *Id.* at A39-A40. It concluded, however, that "[t]he absence of a universe of low cost or pro bono attorneys willing to take on [IDEA] cases" did not "demonstrate that the purpose and objectives of Congress are impeded by the [State's] traditional prohibition of legal representation of parties by persons untrained in the law." *Id.* at A40.

4. The Supreme Court of Delaware affirmed. Pet. App. A1-A15. At the outset, the court rejected the parties' respective contentions that the plain language of Section 1415(h)(1) compelled resolution of the preemption issue one way or the other. *Id.* at A5-A6. The court concluded, to the contrary, that the statutory

provision "is ambiguous to the extent it appears to confer joint authority on lawyers and non-lawyers to accompany and advise parents" in IDEA "due process" hearings. *Id.* at A6.

In interpreting that ambiguous provision, the court looked first to the Third Circuit's opinion in *Arons* v. *New Jersey State Board of Education*, *supra*. Pet. App. A6-A8. It quoted with approval the Third Circuit's observations that the IDEA does not specifically refer to lay advocates presenting evidence or performing other specific representational functions, that it does not use the word "represent," and that the court of appeals' "search through the legislative history ha[d] failed to uncover any indication that Congress contemplated that the 'individuals with special knowledge' [referred to in the Act] would act in a representative capacity." *Id.* at A6-A7 (quoting *Arons*, 842 F.2d at 62-63).

Turning to federal legislative materials, the Supreme Court noted a Senate Report that described the lay advocate's role as one of "consultation," which the court regarded as "compelling evidence that Congress did not intend non-lawyers to advocate on behalf of parents in due process hearings." Pet. App. A8. The court concluded that statements in a Conference Report and in floor debate, to the effect that parents would have "'the right to counsel and to be advised and accompanied by individuals with special knowledge,'" "confirm[ed] the clear distinction that Congress envisioned between the representational role of counsel and the advisory role of non-lawyers." *Ibid.* (in part quoting S. Conf. Rep. No. 455, *supra*, and 121 Cong. Rec. 37,416 (1975) (statement of Sen. Williams)).

The court adverted to Congress's later amendment of Section 1415(b)(7) to require that notice of an IDEA

complaint be given by "the parent of a child with a disability, or the attorney representing the child," which the court believed provided further support for the argument that the Act does not contemplate lay representation of parents at IDEA hearings. Pet. App. A8-A9. It noted also that Congress had not amended the Act in response to the Third Circuit's decision in *Arons*. *Id.* at A9. In addition, the court agreed with the Board that Congress's "explicit[] inclu[sion of] language in other federal statutes to permit lay representation" showed that Congress "knows how to provide such authority when it wishes to do so," and "strongly suggests that Congress chose not to create a right to lay representation in [IDEA] due process hearings." *Ibid.*

The Supreme Court acknowledged (Pet. App. A10-A11) that it owed "some level of deference" to the interpretation of Section 1415(h)(1) adopted by the Secretary of Education, as set out both in the 1981 opinion letter and in an amicus curiae brief filed with the court in this case (see *id.* at A5). In the court's view, however, the degree of deference required was "modest," because deference was "due only to a 'reasonable' administrative interpretation," and because "less deference is due to informal agency interpretations, such as that expressed in the [1981 opinion] letter, than to formal agency regulations adopted after a notice and comment period." *Id.* at A11. In any event, although it never actually declared that the Secretary's interpretation was incorrect or unreasonable, the court did not defer to that interpretation. Observing, instead, that the Secretary's analysis was "subject to criticism" (*ibid.*), the court concluded that "the language of section 1415(h)(1) cannot be interpreted as granting any clear right to lay representation." *Id.* at A15. Because that

conclusion, in the court's view, "render[ed] moot [petitioners'] claim that the IDEA preempts any state-law proscription against the unauthorized practice of law," the court affirmed the Board's decision that petitioners must cease and desist from representing the parents of children with disabilities at IDEA hearings. *Ibid.*

Finally, the Supreme Court addressed (Pet. App. A12-A15) an argument, advanced by petitioners in that court, that in view of the apparent lack of affordable legal representation available to parents in IDEA administrative proceedings, "due process would be violated by forbidding parents from having non-lawyer representation" (*id.* at A12). In rejecting that contention, the court indicated that it was not persuaded on the record before it that denial of lay representation would deprive many parents of "the only assistance available to them" in IDEA hearings. *Id.* at A14. The court observed, however, that "[i]f it could be demonstrated that an unmet need exists and that the local bar could not adequately respond, th[e] Court would consider the adoption of a rule allowing lay representation in a certain limited class of cases." *Id.* at A15.

DISCUSSION

1. The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education," and in that process "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. 1400(d)(1)(A)-(B). Although the Act is built on a cooperative model that "emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness," Congress "recogniz[ed] that this cooperative approach would not always produce a consensus between the school officials and the

parents, and that in any disputes the school officials would have a natural advantage." *Burlington Sch. Comm.* v. *Massachusetts Dep't of Educ.*, 471 U.S. 359, 368 (1985). Accordingly, in framing the Act, "Congress incorporated an elaborate set of * * * 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *Ibid.*; see also, *e.g.*, *Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 205-206 (1982) ("It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process * * * as it did upon the measurement of the resulting [individualized educational program] against a substantive standard.").

IDEA "due process" hearings of the sort at issue here are a critical component of the Act's "procedural safeguards." See *Burlington*, 471 U.S. at 369. The Act provides that, at such hearings, the parents of a disabled child have "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). Since 1981, the Secretary of Education has interpreted that language to require States that receive funds under the IDEA to allow qualified non-lawyers to represent parents at IDEA due process hearings. See App., *infra*, 1a-12a .

As amicus curiae in the Delaware Supreme Court, the United States argued that the IDEA's language and structure support the Secretary's position. See U.S. Amicus Br. 15-24; cf. Pet. App. A6. In conferring on parents the right to be "accompanied and advised" at such hearings, Section 1415(h)(1) applies those terms

equally to "counsel" and to "individuals with special knowledge or training" in the area. There is, moreover, no dispute that the Act authorizes parents to represent themselves (according them, for example, the right to "present evidence and confront [and] cross-examine * * * witnesses," 20 U.S.C. 1415(h)(2)), and that it authorizes lay experts to "accompan[y]" parents to such hearings and to "advise[]" them step-by-step on how to proceed. In view of those provisions, it makes little sense to read the Act to permit participating States to require parents who do not have a lawyer to use "a clearly wasteful, time-consuming, and imprecise process whereby the expert's questions and evidence are funneled through parents" acting pro se, simply because the Act uses the word "advised" rather than the word "represented." U.S. Amicus Br. 4; see Pet. App. A6-A7.

The Delaware Supreme Court focused on lawyers' traditional role in providing "representation" in adversary proceedings, and posited a "clear distinction that Congress envisioned between the representational role of counsel and the advisory role of non-lawyers." Pet. App. A8; see *id.* at A3-A4, A6-A9. Lawyers, however, also traditionally "accompan[y] and advise[]" (or provide "counsel") to their clients, in both adversary and non-adversary settings. The court did not suggest that petitioners would be engaging in the unauthorized practice of law if they provided parents with detailed advice concerning their rights under the IDEA and the procedures available for protecting those rights, or if they assisted parents in negotiating with school officials concerning what types of assistance would be appropriate for their disabled children. Yet such advice or assistance might equally, and perhaps more traditionally, be provided by a lawyer. The terms used in

Section 1415(h)(1) do not by themselves readily communicate any "clear distinction" in roles between lawyer and non-lawyer "advise[rs]."

Indeed, the Supreme Court of Delaware acknowledged that the language of the IDEA was at least "ambiguous" in this regard. Pet. App. A6 (noting that the Act "appears to confer joint authority on lawyers and non-lawyers to accompany and advise parents * * * [at] due process hearings"). The court also acknowledged that, in view of that ambiguity, it owed at least "some level of deference" to the Secretary of Education's interpretation of the Act. *Id.* at A10-A11 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984)). In fact, however, the court neither deferred to the Secretary's interpretation, nor explained why that interpretation was not "a permissible construction of the statute." 467 U.S. at 843. The court's summary analysis (Pet. App. A11-A12) and its observation that the Secretary's position is "subject to criticism" (*id.* at A11) do not adequately justify the court's decision, which effectively "substitute[s] its own construction of a statutory provision for a reasonable interpretation made by the [Secretary]." *Chevron*, 467 U.S. at 844.[2]

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[2] See *Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted * * *, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."); see also, *e.g.*, *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, 525 U.S. 449, 453 (1999) (deference to Secretary's reading of statutory provision is required where the construction is "within the bounds of reasonable interpretation"); *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (deferring to agency's interpretation of its regulation, expressed in legal brief); *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995)

2. Nonetheless, the question of federal authorization of lay representation in IDEA hearings does not warrant this Court's review at the present time.

a. The Delaware Supreme Court is the first court to have squarely addressed whether Section 1415(h)(1) creates a federal right of lay representation at IDEA hearings. While two federal courts of appeals have touched on the question, in each case the issue presented was not whether federal law compels a state to permit a lay representative to appear in an IDEA hearing, but whether, if such a representative appears, federal law authorizes an award of attorney's fees. Thus, in *Z.A.* v. *San Bruno Park School District*, 165 F.3d 1273 (9th Cir. 1999), the court noted (*id.* at 1275-1276), in passing, that a lawyer not admitted to the bar in California "could only appear at [a California IDEA] hearing in a nonlawyer advisor capacity," citing both 20 U.S.C. 1415(d)(1) (1994) (now Section 1415(h)(1)) and an identically worded provision of the California Education Code. However, the issue before the court was "whether a lawyer who prevails in a state administrative proceeding must be admitted to the [state] bar in order to collect attorney's fees under the IDEA," 165 F.3d at 1275, and the court held (*id.* at 1276) that admission was required in order to collect such fees.

Likewise, the Third Circuit's decision in *Arons* v. *New Jersey State Board of Education*, 842 F.2d 58, 61-63, cert. denied, 488 U.S. 942 (1988), involved only the availability of attorney's fees, because state law

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(deferring to statutory interpretation advanced in letter granting Comptroller of the Currency's permission for bank to engage in certain activities); but see *Christensen* v. *Harris County*, 529 U.S. 576, 586-588 (2000) (declining to accord full *Chevron* deference to interpretation set out in agency opinion letter).

expressly permitted lay representation. See *id.* at 60, 62.[3] In any event, to the extent the *Arons* opinion included language relevant to the question of whether Section 1415(h)(1) authorizes lay representation (as opposed to mandating payment for such representation), the Third Circuit's analysis was consistent with that of the Delaware Supreme Court in this case. See Pet. App. A6-A7 (quoting and relying on *Arons*), A9. Accordingly, the Delaware Supreme Court's decision does not create any judicial conflict that requires resolution by this Court.[4]

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[3] It appears that *Arons*' statements that state law authorized lay representation may have been over-simplified. A later district court decision notes that at the time *Arons* was decided, New Jersey permitted lay representation only on the theory that it was "required by federal statute or regulation." *Woods* v. *New Jersey Dep't of Educ.*, 858 F. Supp. 51, 53 n.4 (D.N.J. 1993). *Woods* also explains, however, that after *Arons* the applicable state court rules were amended specifically to permit lay representation in IDEA hearings, even in the absence of any federal mandate to that effect. *Ibid.* In any event, the Third Circuit's analysis in *Arons* proceeded from the premise that state law authorized lay representation without regard to federal law. See also *Connors* v. *Mills*, 34 F. Supp.2d 795, 806-808 (N.D.N.Y. 1998) (concluding that New York law provides for lay advocacy at IDEA hearings, but rejecting payment of attorney's fees to non-lawyers "[i]n the absence of affirmative state action in promulgating regulations that govern the training and conduct of lay advocates").

[4] Cf. *Collingsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 230-237 (3d Cir. 1998) (although the IDEA gives parents themselves the right to represent their children in administrative hearings, it confers no right to proceed in federal court without a lawyer); *Devine* v. *Indian River County Sch. Bd.*, 121 F.3d 576, 581-582 (11th Cir. 1997) (same), cert. denied, 522 U.S. 1110 (1998); *Doe* v. *Board of Educ.*, 165 F.3d 260 (4th Cir. 1998) (refusing to award fees to attorney parent who represented child in court proceeding under the IDEA), cert. denied, 526 U.S. 1159 (1999).

b. The practical significance of this case is not yet clear. The Delaware Supreme Court's decision applies, of course, only in that State, and petitioners represent (Reply Br. 3) that all other States have, at least until now, permitted non-lawyer representation at IDEA hearings. Unless other States decide both to follow Delaware's lead as a matter of state law and to adopt its interpretation of federal law, the decision in this case will have little national significance.

Within Delaware itself, the issue of lay representation at IDEA hearings is likely to arise in only a small number of cases. The State's IDEA program provided benefits to over 16,000 children and young adults (ages 3-21) in the 1998-1999 school year. U.S. Dep't of Educ., *Twenty-Second Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* A1 (Table AA1) (2000). The Delaware Department of Education informs us, however, that in a seven-year period from 1989 through 1996—the year that unauthorized practice proceedings were commenced against petitioners, see Pet. App. A43—the State received, on average, between eight and nine requests for IDEA hearings each year, and a hearing was ultimately required in an average of only three such cases per year. Those figures are open to interpretation: The small number of requested hearings could reflect the inadequacy of the representation available to aggrieved families, as much as or rather than the successful functioning of the Act's ideally "cooperative approach." *Burlington*, 471 U.S. at 368; see Pet. App. A50-A51. Nonetheless, they suggest that the practical problem created by the state Supreme Court's decision is, for the moment, limited in scope.

Where a hearing is held, moreover, the Delaware Supreme Court's decision does not purport to preclude

qualified non-lawyers from accompanying parents and providing them with advice and guidance. It prohibits them only from engaging directly in the sort of specific representational activities—such as "making opening statements, examining and cross-examining witnesses, [and] making and arguing evidentiary objections," Pet. App. A23 (Board opinion), A49 (stipulation)—that the State has determined constitute the practice of law. Cf. *id.* at A8 (distinguishing between consultation or advice and advocacy or representation). While indirect assistance will never be an ideal way to help parents protect their own and their children's interests, it will sometimes suffice.

Finally, the Supreme Court's opinion indicates that the court is prepared to consider whether existing mechanisms are sufficient to meet the need for representation on behalf of children with disabilities and their parents. See Pet. App. A13-A15; see also *id.* at A41 (Board's opinion) ("[Petitioners] and [the state Office of Disciplinary Counsel] agree that [nonlawyer representation] is an issue that should be addressed, but it must be addressed to the proper body with rule-making authority[.]"). This case was argued and decided on the basis of stipulated facts. See *id.* at A43-A57 (stipulation and amendment). Although the stipulation identifies only one legal services organization that has provided counsel at IDEA hearings, *id.* at A55, and strongly suggests that there is an unmet need for free or low-cost representation at such hearings, see *id.* at A49-A51, the Supreme Court concluded that the record before it did not support petitioners' contention that the court's decision concerning lay representation would deny "parents and children * * * 'the only assistance available to them.'" *Id.* at A14.

The court expressly stated, however, that "[i]f it could be demonstrated that an unmet need exists and that the local bar could not adequately respond, th[e] Court would consider the adoption of a rule allowing lay representation" in appropriate cases. Pet. App. A15. Accordingly, to the extent the Delaware Supreme Court's decision does have an adverse practical effect in Delaware, the court has indicated a willingness to reconsider its decision. It is possible, therefore, that Delaware will, in the reasonably near term, either provide for the availability of free or low-cost legal assistance with IDEA hearings, or bring its law back into conformity with that of other States by adopting an appropriate express exception to its present legal practice rules. Cf., *e.g.*, *Woods* v. *New Jersey Dep't of Educ.*, 858 F. Supp. 51, 53 n.4 (D.N.J. 1993) (discussed in note 3, *supra*). In this respect as in those discussed above, review of the question presented in this case would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2001

APPENDIX

[seal omitted]

U.S. DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

April 8, 1981

OFFICE OF THE
GENERAL COUNSEL

The Honorable Frank B. Brouillet
Superintendent of Public Instruction
7510 Armstrong Street, S.W.
Tumwater, Washington 98504

Dear Superintendent Brouillet:

Pursuant to Mr. Steven Minter's letter of November 5, 1980 to you, this letter provides a legal analysis regarding the role of lay advocates in educational agency administrative hearings and appeals conducted under Part B of the Education of the Handicapped Act, as amended, 20 U.S.C. 1411 *et seq.* (EHA).

I. AS A CONDITION FOR FUNDING UNDER THE EHA A STATE MUST COMPLY WITH FEDERAL REQUIREMENTS

The EHA authorizes federal financial assistance to states meeting the conditions set forth in the Act. 20 U.S.C. 1411, 1412, 1420. Each state must submit for federal approval a plan for the operation of the program within the state which indicates that the program is being administered in accordance with the applicable statutory and regulatory requirements. 20 U.S.C. 1413. See also 34 C.F.R. 300.110; 300.111. Once a state chooses to participate and receive financial assistance, the state must comply with the provisions of the EHA and its implementing regulations, 34 C.F.R. Part 300. As the Third Circuit Court of Appeals stated in *Battle* v. *Commonwealth of Pennsylvania*, 629 F.2d 269, 272 (3rd. Cir. 1980) the EHA "establishes a program of cooperative federalism which sets requirements which must be complied within order for states to receive financial assistance." The principle that acceptance of assistance under a grant program obligates a state to meet the requirements of the enabling federal statute even where state law, regulation or policy provides otherwise is firmly established.

In *King* v. *Smith*, 392 U.S. 309 (1968), the Supreme Court, in discussing the AFDC program, stated:

> There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and

> conditions is to that extent invalid. 392 U.S. 333, note 34.

See also *Rosado* v. *Wyman*, 397 U.S. 397, 421-423 (1970) and *Van Lare* v. *Hurley*, 421 U.S. 338, 340 (1975) ("states that seek to qualify for AFDC funding must operate a program not in conflict with the Social Security Act"). *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971) establishes that "a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." See also *Carleson* v. *Remillard*, 406 U.S. 598, 600-601 (1972) and *Miller* v. *Youakim*, 440 U.S. 125, 132 (1979) (a state foster case scheme inconsistent with the Social Security Act is invalid under the Supremacy Clause).[5]

The principles enunciated above are equally applicable to the EHA financial assistance program. In finding state due process procedures inconsistent with the guarantees of 20 U.S.C. 1415 the court in *Monahan* v. *Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980) stated:

> The Education of All Handicapped Children Act provides specific procedural safeguards which must be adopted by states receiving funds under the Act. These safeguards govern educational proceedings in

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[5] Several other courts have stated that Congress may condition the grant of federal monies upon a state's fulfillment of federal requirements, and that once a state elects to participate, it must meet such requirements. *Page* v. *Preisser*, 585 F.2d 336, 341 (8th Cir. 1978); *Bourgeois* v. *Stevens*, 532 F.2d 799, 802 (1st Cir. 1976); *Florida* v. *Mathews*, 526 F.2d 319, 326 (5th Cir. 1976); *Connecticut State Department of Public Welfare* v. *Department of Health, Education and Welfare, Social and Rehabilitation Service*, 448 F.2d 209, 215 (2nd Cir. 1971).

> Nebraska, since it is a recipient of funds under the Act. Thus, any Nebraska law which is inconsistent with these federally mandated procedures is superseded by the federal law. 491 F. Supp. 1091.

In *Vogel* v. *School Board of Montrose R-14 School District*, 491 F. Supp. 989, 993 (W.D. Mo. 1980) the court held that "whenever a conflict exists between the procedural safeguards mandated by 20 U.S.C. § 1415 and state law the applicable federal law is controlling." See also *Stuart* v. *Nappi*, 443 F. Supp. 1235 (D. Conn. 1978).

II. A STATE THAT FAILS TO MEET EHA REQUIREMENTS MAY BE DISQUALIFIED FROM RECEIVING FEDERAL FINANCIAL ASSISTANCE

Under 20 U.S.C. 1413(c) the Secretary of Education is required to approve a state plan which meets the requirements of 20 U.S.C. 1413(a) and (b) and which is submitted by a state eligible in accordance with 20 U.S.C. 1412. A state plan not meeting these criteria must be disapproved, and in such an instance federal grant money would not forthcoming.

In addition, failure by a state educational agency to comply substantially with 20 U.S.C. 1412 may result in withholding of federal financial assistance. 20 U.S.C. 1416.

Section 1412(5) of Title 20, United States Code, requires that in order to qualify for financial assistance a state must demonstrate that it "has established . . . procedural safeguards as required by section 1415 . . . ." See also 34 C.F.R. 300.131. Section 1415(d)(1) provides that in administrative due process hearings and appeals conducted pursuant to the EHA any party shall be

accorded "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children .... Consequently, a state's compliance with 20 U.S.C. 1415(d)(1) is a condition to its receipt of EHA assistance.

III. THE REQUIREMENT OF 20 U.S.C. 1415(d)(1)

The remaining issue concerns the meaning of the requirement that a party to an educational agency administrative hearing or appeal be accorded "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children." 20 U.S.C. 1415(d)(1).[6] See also 34 C.F.R. 300.508(a)(1).

In considering this issue, we have examined what we understand to be your argument that Congress did not intend to permit actual representation by lay advocates at due process hearings. As we understand it, this argument relies on a sentence in the Conference Report accompanying P.L. 94-142 stating that in administrative due process hearings a party shall be "accorded (1) the

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[6] Satisfying the 42 U.S.C. 1415(d)(1) requirement would render a state in compliance with the due process requirement of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794. Section 504 is a broadly-phrased statute prohibiting discrimination on the basis of handicap in programs or activities receiving federal financial assistance. The regulations implementing Section 504 mandate that recipients operating a public elementary or secondary education program establish and implement a system of procedural safeguards for handicapped persons including an impartial hearing with opportunity for participation by the person's parents and representation by counsel. The regulation goes on to indicate, however, that "compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement." 34 C.F.R. 104.36.

right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with respect to the problems of handicapped children . . . ." S. REP. NO. 455, 94th Cong., 1st Sess. 49 (1975) *reprinted in* (1975) U.S. CODE CONG. & AD. NEWS, 1425, 1503 (see page 9 of Declaratory Ruling 1-80, issued June 5, 1980 and later rescinded). In addition, your August 19, 1980, letter to Secretary Hufstedler, when read in conjunction with Dr. Martin's letter of August 14, 1980, addressed to you, appears to suggest that the absence of the word "represented" in the EHA, and the usage of the words "accompanied and advised", indicates that the issue of representation was never addressed by the EHA and consequently is a matter for state determination.

For the following reasons, we are not persuaded that this is the correct view of the law, and believe that under the EHA lay advocates are permitted to represent parties at administrative hearings and appeals.

First, the statute does not on its face distinguish between counsel and persons with "special knowledge or training" in the field of handicapped children with respect to their involvement at administrative hearings. No bifurcation of function is set forth in the statute. It appears clear from the statutory language alone that Congress contemplated that lay advocates, as well as attorneys, be permitted to play a role at such hearings, and did not distinguish between lawyers and lay persons in defining that role.

Moreover, we believe the legislative history of EHA-B supports the proposition that attorneys and lay advocates may engage in the same activities at administrative hearings and appeals. The quotation from the P.L. 94-142 Conference Report cited in the Declaratory

Ruling is not unambiguous itself, and the construction given it in the Declaratory Ruling is not supported by other legislative history.

Section 1415(d)(1) was included in H.R. 7217 as passed by the House. 121 CONG. REC. 25547 (1975).[7] Congressman Miller of California, largely responsible for developing the impartial due process provisions of section 1415 [see 121 CONG. REC. 37025, 37027 (1975)], did not distinguish between the role played by attorneys or lay advocates but rather stated that "the complainants will have the right to be accompanied by counsel or other qualified individuals who possess 'special knowledge or training with respect to the education of handicapped children'," 121 CONG. REC. 25539 (1975).

Senator Cranston, in complimenting Representative Miller on his work, noted that the "procedural requirements . . . are consistent with the existing California statutory and master plan requirements on this subject." 121 CONG. REC. 37418-9 (1975). Prior to and during the time P.L. 94-142 was under consideration and ultimately passed by Congress the California statute concerning educational services for children with exceptional needs provided that parents disagreeing with the findings of local educational assessors regarding placement or services offered to the child had the right to request a hearing before local educational authorities. At these hearings the parent had the right "to represent himself or herself, or to select a repre-

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[7] The Senate predecessor to P.L. 94-142, S.6, as passed by the Senate, 121 CONG. REC. 19506, 19508 (1975) did not contain a comparable provision. Technically, the House passed S.6 but struck all but the enacting clause of S.6 and inserted the provisions of H.R. 7217.

sentative . . . ." See Assembly Bill No. 4040, Chapter 1532, Section 7022.2(c), filed with California Secretary of State, September 27, 1974.[8] There was no requirement that the representative be an attorney, nor were any functions reserved to attorneys at such hearings. We have consulted with the legal office of the California state educational agency and that office confirms that lay advocates represented parents in hearings prior to the passage of P.L. 94-142.

Finally, the House Report accompanying H.R. 7217, H. REP. NO. 332, 94th Cong., 1st Sess. 32 (1975), makes no mention of the right to counsel but simply states that persons participating in due process hearings "may be accompanied and advised by counsel and by individuals with special knowledge regarding the problems of handicapped children."

In light of the above, and in the absence of any evidence that the Congress intended to limit the role of lay advocates at administrative hearings and appeals conducted pursuant to the requirements of EHA-B, we believe that attorneys and lay advocates may perform the same functions at such hearings.

Provision for lay advocates in federal regulation is not unprecedented. Lay advocates are permitted to represent parties at several different kind of federally mandated administrative hearings conducted by state or local authorities. For example, under the Food Stamp Program an aggrieved household entitled to a fair hearing at the state and local level may "present the case or have it presented by a legal counsel or other person." 7 C.F.R. 273.15(p)(2). A state plan under Title

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[8] Parents were also permitted access to school records, the right to present evidence, and the right to call witnesses.

I, IV-A, X, XIV or XVI of the Social Security Act must provide for hearings at the state or local level at which an applicant or recipient "may be represented by an authorized representative, such as legal counsel, relative, friend, or other spokesman . . ." 45 C.F.R. 205.10(a)(3)(iii). Representation by lay advocates at federal hearings is commonplace.[9]

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[9] A party to a proceeding before the Social Security Administration to determine eligibility for Old Age, Survivors, or Disability Insurance is afforded the opportunity to be represented by an attorney or another individual qualified under the regulations to act as a representative. 20 C.F.R. 404.971, 972. Regulations implementing the Supplemental Security Income for the Aged, Blind and Disabled and Medicare programs expressly give a claimant the right to "appoint as his representative" in federal administrative proceedings either an attorney or a person other than an attorney qualified under the regulations. 20 C.F.R. 416.1501, 1503; 42 C.F.R. 405.870, 871. Under 20 C.F.R. 410.684, 685 the same is true in Social Security Administration hearings conducted to determine entitlement to benefits under Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. The Employment Standards Administration of the Department of Labor permits representation by attorneys or non-attorneys at hearings conducted pursuant to the Longshoremen's And Harbor Workers' Compensation Act and Part C of Title IV of the Federal Mine Safety and Health Act, as amended. 20 C.F.R. 702.131, 334; 20 C.F.R. 725.362, 363. In none of the administrative hearings described above is any distinction made between the role played by attorneys or non-attorneys. 20 C.F.R. 404.973; 20 C.F.R. 416.1505; 42 C.F.R. 405.872; 20 C.F.R. 410.686; 20 C.F.R. 725.364. The Veterans Administration "may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration." 38 U.S.C. 3404(a). See also 38 U.S.C. 3403 and 4005(b)(2), and 38 C.F.R. 14.626-631.

State laws regarding the unauthorized practice of law may not govern who appears as a representative in such proceedings. See *Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379 (1963) in which

While of course each federal grant program administered by the states must be evaluated according to the particular statute and regulations under which the program is authorized, the fact that lay representation before administrative agencies is not an unusual practice does tend to support the view that Congress intended to allow such representation at hearings conducted pursuant to the EHA. There is no reason to believe that Congress intended to restrict representa-

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the state sought to enjoin a non-lawyer authorized by federal statute to practice before the United States Patent Office from practicing in Florida because he did not have a law license. The court rejected Florida's argument that it had authority to enjoin in that instance. While noting that under Florida law the preparation and prosecution of patent applications for others constituted the practice of law, and that Florida had a substantial interest in regulating the practice of law within the state, the Supreme Court held that by virtue of the Supremacy Clause the state law must yield when incompatible with federal legislation:

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. "No State law can hinder or obstruct the free use of a license granted under an Act of Congress." *Pennsylvania* v. *Wheeling & B. Bridge Co.*, 13 How. 518, 566. 373 U.S. 385 (footnotes omitted).

The Court stated that Florida could maintain control over the practice of law within its borders "except to the limited extent necessary for the accomplishment of the federal objectives" 373 U.S. 402 (footnote omitted), and noted that the authority of Congress is no less when the State power displaced is exercised by the state judiciary rather than the state legislature. 373 U.S. 403. See also *Silverman* v. *State Bar of Texas*, 405 F.2d 410 (5th Cir. 1968).

tion at EHA hearings and appeals to attorneys, rather than allowing for the widest possible advocacy.[10]

The state of Washington may of course regulate the practice of law within the state but the state's policy must not conflict with the EHA if Washington is to receive funding under the statute. Whether an actual amendment to state law is necessary in order to allow representation by lay advocates at administrative hearings and appeals conducted pursuant to the EHA is strictly a matter for the state to decide. Our only concern is that WAC 392171-510 appears to prohibit lay advocates from representing parties at such hearings in violation of federal requirements.

In reviewing WAC during the preparation of the analysis we noted that under WAC 1-08-005 each agency may adopt its own rules of practice and procedure, including regulating who may appear and practice before an agency, and further noted that representation by lay advocates is in fact permitted before certain other Washington state agencies. For instance, in public assistance hearings an appellant may be "represented by legal counsel or by a relative, friend or other spokesman. . . ." WAC 388-08-010, and under WAC 263-12-020 representation by lay advocates is permitted at hearings before the Washington Board of Industrial Insurance Appeals.[11]

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[10] In this regard, we deem relevant the fact that there is no requirement that hearing officers conducting such proceedings be attorneys. 34 C.F.R. 300.507.

[11] According to your own Office's regulations governing hearings conducted by educational agencies relating to the challenge of information in records, a parent or adult student "may be assisted or represented by individuals of his or her choice . . . including an

In light of the above, and because it is our understanding that the Washington Attorney General's Office has not issued a formal opinion on the matter, you may wish to share this analysis with that Office if you continue to have reservations about this Department's view of the role of lay advocates in EHA proceedings. We would be happy to provide any further assistance you may request, including our views on the means available to your agency to ensure that lay advocates are qualified to assist the parents of handicapped children, and to ensure that parent advocates observe reasonable rules of procedure in those proceedings.

Theodore Sky
Acting General Counsel

By: /s/ BARRY W. STEVENS
BARRY W. STEVENS
Acting Deputy General Counsel

cc: Mr. Ralph Julnes

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attorney." WAC 392-171-585(4). It would appear that lay advocates are permitted to represent parties at such hearings.

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Supreme Court, U.S.
FILED

MAY 18 2001

CLERK

No. 00-509

IN THE
Supreme Court of the United States

MARILYN ARONS, RUTH WATSON, AND PARENT INFORMATION CENTER OF NEW JERSEY, INC.,
Petitioners,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF DELAWARE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO THE SUBMISSION OF THE UNITED STATES AS AMICUS CURIAE

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May 2001

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SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO THE SUBMISSION OF THE UNITED STATES AS AMICUS CURIAE

Petitioners Marilyn Arons, Ruth Watson, and the Parent Information Center for New Jersey file this brief pursuant to Rule 15.8, Rules of the Supreme Court, to respond to the recommendation of the United States that this Court deny the petition for a writ of certiorari in this case, even though the United States concurs wholeheartedly with petitioners that the ruling of the Delaware Supreme Court is wrong on all counts:

* The United States agrees that the Individuals with Disabilities Education Act ("IDEA") confers on parents the right to have non-lawyer experts represent them in due process hearings held under the Act, and preempts inconsistent state law. U.S. Br. at 9-10 (setting forth the United State's interpretation of 20 U.S.C. § 1415(h)(1)).

* The United States agrees that permitting qualified non-lawyers to represent parents in IDEA due process hearings is crucial to the effective implementation of IDEA, pointing out that IDEA's representation provision is "a critical component of the Act's 'procedural safeguards.'" U.S. Br. at 10 (*quoting Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 369 (1985)).

* The United States agrees that the Delaware Supreme Court wrongly failed to accord any weight to the Department of Education's longstanding view that IDEA confers on parents a right to be represented by qualified non-lawyers in due process hearings, thereby disregarding this Court's deference doctrine. U.S. Br. at 12.

* And the United States agrees that the ruling of the Delaware Supreme Court "makes little sense." U.S. Br. at 11.

Nonetheless, the United States recommends that this Court deny the petition for a writ of certiorari because the Delaware Supreme Court is the first court to decide the question of whether IDEA creates a right of lay representation (*see* U.S. Br. at 12-14) and because the ruling, albeit in error, has "little national significance" because it affects only Delaware. *See id.* at 15. Neither of these reasons justifies denial of the writ.

1. We agree that the Delaware Supreme Court's ruling does not squarely create any judicial conflict. But the conclusion the United States draws from the lack of conflict is wrong; this case merits review now because the Delaware Supreme Court's ruling, coupled with the Third Circuit's ruling in *Arons v. New Jersey State Board of Education*, 842 F.2d 58, *cert. denied*, 488 U.S. 942 (1988), point other courts in one and only one misguided direction: to the conclusion that IDEA does not create a right of non-lawyer representation in IDEA due process hearings. The Delaware Supreme Court has emphatically so ruled. In reaching its conclusion, the Delaware Court relied heavily on *Arons*, in which the Third Circuit upheld a ruling forbidding non-lawyers from receiving statutory attorney's fees in IDEA proceedings because, in its view, IDEA does not create a right of non-lawyer representation. And now, it appears, Pennsylvania is following suit. *See* n.1, *infra*.

While these rulings do not create a *judicial* conflict, they create a conflict every bit as worthy of this Court's review. These rulings are in flat and irreconcilable conflict with the position of the Department of Education, which since 1981, "has interpreted . . . [IDEA §1415(h)(1)] to require States that receive funds under IDEA to allow qualified non-lawyers to represent parents at IDEA due process hearings." U.S. Br. at 10. This Court has often granted review in cases where the case law was clearly at variance with established federal regulatory policy, and this is just such a case.

2. Even more importantly, the United States is simply wrong to suggest as its other reason to deny review that the "practical significance of this case is not yet clear" because the decision below affects "just" Delaware.

First, the United States' "let's hope the sky doesn't fall in" approach is a not a sound reason to defer review. To be sure, it is not yet clear how many states will decide to follow Delaware's lead and forbid non-lawyers from representing parents at IDEA due process hearings. But Pennsylvania already has begun the process of amending its rules to bar non-lawyer representation and, no doubt, the lawyers advising other states know that this petition is still pending and will not act until this Court does.[1]

Moreover, as this Court has recognized time and again, the economic pressures imposed by IDEA on states are intense. *See, e.g., Cedar Rapids Community School District v. Garrett F.*, 119 S. Ct. 992 (1999). If states understand that they can

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[1] On August 8, 2000, less than one month after the Delaware Supreme Court's ruling, the Attorney General of Pennsylvania instructed the Department of Education to amend its rules to forbid qualified non-lawyers from serving in a representational capacity in IDEA hearings. *See* 30 Pa. Bull. 4628, 4630. On September 2, 2000, the Board of Education proposed a rule amendment "to make it clear that both under Federal statute and regulations and under State law, licenced attorneys only may represent parents in due process hearings." *Id.* The proposal repeals the existing rule, 22 Pa. Code §14.64(h), which provides that "[p]arents may be represented by any person, including legal counsel," and substitutes language that tracks that of IDEA § 1415(h)(1), to "clarif[y]" that non-lawyers "may not perform any functions that constitute the practice of law." 30 Pa. Bull. at 4629. *See generally,* Winnick, *Special Ed Rules Get State OK; But Critics Claim Revised Rules Remove Some Students' Safeguards,* C-1, Pittsburgh Post Gazette (Jan. 19, 2001).

dramatically decrease the number of IDEA due process hearings just by forbidding lay representation, as Delaware has done so successfully so far, the floodgates will soon open or, more precisely, the representation gates will soon close, as they are about to in Pennsylvania. The time to address this problem is now, not when thousands of parents nationwide are forced to confront the Hobson's choice now facing Delaware parents.

Second, the "just Delaware" argument overlooks the serious adverse impact that the ruling has and will continue to have in Delaware. According to the United States' statistics, 16,000 families in Delaware have children who qualify for assistance under IDEA. U.S. Br. at 15. The record here is clear: These 16,000 families have virtually no access to legal representation, *see* Pet. App. A49-51 (¶¶ 20-28), which, as the United States admits, likely explains the rarity of due process hearings in Delaware. Indeed, it appears that but for petitioners' assistance, there would have been no or virtually no due process hearings in Delaware during the relevant time-frame. Rather than suggest that the problem is "limited in scope" as the United States speculates (Br. at 15), these statistics only confirm petitioners' concern — fully supported by the stipulated record — that unless qualified non-lawyers are available to help parents in IDEA due process hearings, parents are likely to forego their right to a hearing because they are "intimidated by the formality and complexity of the due process hearing," they are not "familiar with the procedures used in due process hearings . . . or in legal proceedings," and they lack "the grounding in the technical issues" that lie at the "core of their disputes with the local school boards." Pet. App. A51 (¶¶27-28).

The final reason given by the United States to deny review is the hope that, although the Delaware Supreme Court issued its opinion nearly a year ago, and although this issue has

been percolating in Delaware since August 1996, the Delaware Supreme Court might change its rules to permit non-lawyer representation. The United States even speculates that it "is possible . . . that Delaware will, in the reasonably near term, either provide for the availability of free or low-cost legal assistance with IDEA hearings, or bring its law back into conformity with that of other states by adopting an appropriate express exception to its present legal practice rules." U.S. Br. at 17. Suffice it to say that nothing supports this panglossian prognostication. As to the United States' suggestion that Delaware might seek to provide legal assistance to parents in IDEA hearings, that is the United States' own invention — not even the Delaware Supreme Court went so far; it mentioned only the possibility of revising its unauthorized practice of law rules. And as to that possibility, the fact remains that almost a year has passed without any hint from the Delaware Supreme Court that the rulemaking mentioned in its opinion was anything more than a fig leaf to mask the harshness of its decision. No rulemaking or other sort of procedure has been initiated, and no signal has been given that one will be commenced. Empty promises are no substitute for enforceable rights.

CONCLUSION

For the reasons stated above and in petitioners' prior submissions, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2001